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Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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104 pp

QUESTION PRESENTED

Whether, as the divided Ninth Circuit held below, a wholly private entity is constrained by the First Amendment when controlling protests on its own private sidewalk on the basis that the sidewalk – although private property – resembles a "public forum" in certain respects, or whether, as other federal and state courts have held and as this Court's decisions instruct, a private entity's control of expressive activity on its own property can be deemed state action subject to the First Amendment only in exceptionally narrow circumstances involving the equivalent of a "company town."

PARTIES TO THE PROCEEDING

In addition to petitioner Venetian Casino Resort, L.L.C., the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226, and Bartenders Union, Local No. 165, Stewart L. Bell, District Attorney of Clark County, Nevada, the Las Vegas Metropolitan Police Department, Clark County, Nevada, and the American Civil Liberties Union, are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Petitioner Venetian Casino Resort, L.L.C., has no parent corporation. Las Vegas Sands, Inc., which has publicly traded debt but no publicly traded stock, owns more than 10% of the stock of Venetian Casino Resort, L.L.C. No other publicly held company owns 10% or more of the stock of Venetian Casino Resort, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Venetian Casino Resort L.L.C. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). A divided panel of the Ninth Circuit nonetheless held below that petitioner Venetian Casino Resort L.L.C. ("Venetian"), though strictly a private entity, is constrained by the First Amendment when controlling picketing and demonstrations on its own private sidewalk. What is more, the majority reached that determination without undertaking any analysis into whether Venetian's control of its own property can be considered "state action." The court instead assumed that Venetian was subject to the First Amendment based on a conclusion that its private sidewalk resembles a "public forum" in its functional and physical attributes.

"Public forum" doctrine *presupposes* the existence of state action, however, and the Ninth Circuit's cart-before-the-horse approach destroys the most basic rights of private property ownership. Public forum analysis determines the validity of a *governmental* restriction of speech on property that the *government* controls. Until now, no court has used public forum analysis to determine whether the circumstances involve governmental action in the first place. But the opinion below holds that a private entity forfeits its basic prerogative to control the use of its own property by the public whenever its property is deemed to resemble a "public forum." Applying that approach here, the majority found that Venetian is compelled by the First Amendment to allow mass demonstrations on its private property, treating Ve-

netian's sidewalk as if it were public and Venetian as if it were the State. That result works an especially acute infringement of a landowner's rights in the circumstances, forcing Venetian to make space available on its own private property for picketing and protests deliberately designed to destroy its own business interests.

Not surprisingly, the opinion below conflicts with a slew of federal and state court decisions recognizing the need to establish the existence of state action as a threshold matter, before addressing whether the state action restricts speech in a "public forum." And the opinion below necessarily breaks with the settled rule in decisions of this Court that a private entity's control of expressive activity on its own property amounts to state action only in one, exceptionally narrow situation: when the entity controls the functional equivalent of an entire municipality, *i.e.*, a "company town." The Ninth Circuit has extended the "company town" exception far beyond anything recognizable in this Court's jurisprudence. Finally, and most particularly, the decision below is directly at odds with an opinion of the Nevada Supreme Court finding that another hotel-casino's control of expressive activity on the private sidewalk located *directly across the street* from Venetian's is *not* constrained by the First Amendment, so that conflicting constitutional rules now govern opposite sides of one of the most traveled pedestrian thoroughfares in the world – the Las Vegas Strip. Those various conflicts warrant this Court's review, especially in view of the significant implications of the opinion below for the basic rights of private property owners throughout the substantial geographic sweep of the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-38a) is reported at 257 F.3d 937. The opinion of the district court denying Venetian's motion for summary judgment (App. 41a-46a) is not reported. The opinion of the district court deny-

ing Venetian's motion for a preliminary injunction (App. 47a-61a) is reported at 45 F. Supp. 2d 1027 (D. Nev. 1999).

JURISDICTION

The opinion of the Ninth Circuit was issued on July 12, 2001. The petition for rehearing and rehearing en banc was denied on August 23, 2001. On November 7, 2001, Justice O'Connor granted petitioner an extension until December 21, 2001, to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background.

1. Petitioner Venetian owns and operates the Venetian Casino Resort, a luxury hotel-casino located in Las Vegas, Nevada, on Las Vegas Boulevard, a State highway commonly known as "the Las Vegas Strip." App. 2a. In February 1997, before beginning construction of the hotel-casino, Venetian entered into a "pre-development agreement" with respondent Clark County. The agreement contemplated that Venetian would convey property rights to the County or State if required to alleviate the development's anticipated impact on vehicular and pedestrian traffic, including any "public rights-of-way" that might be "needed" to "facilitat[e] the perpetual flow of pedestrian traffic." *Id.* at 49a. Venetian agreed to abide by the results of a County-approved study assessing the effect of the new construction on vehicular and pedestrian traffic. *Id.* at 2a.

The traffic study was completed in September 1997, and it recommended widening Las Vegas Boulevard by one lane along the Venetian frontage. App. 2a. The additional traffic lane would displace a public sidewalk running alongside the roadway, and would take up the full State of Nevada right-of-way on Las Vegas Boulevard, leaving no remaining public right-of-way for a new public sidewalk. Unless the State

obtained an expansion of its right-of-way, therefore, any new sidewalk would have to be constructed on Venetian's private property. The study did not require Venetian to dedicate a right-of-way to the State. *Id.* at 2a-3a.

Venetian entered into negotiations with the Nevada Department of Transportation to resolve the issue of pedestrian passage along (and pedestrian access to) the hotel-casino frontage on Las Vegas Boulevard. Because Las Vegas Boulevard sits on a State, not County, right-of-way, the County deferred to the State to develop an acceptable solution. App. 3a, 50a. In its negotiations with the State, Venetian of course aimed to ensure that pedestrians would have ample access to its hotel-casino frontage. At the same time, Venetian also sought to retain control over its private property to the fullest possible extent.

2. The discussions between Venetian and the State produced an agreement on January 8, 1999 ("the 1999 Agreement"). *See* App. 19a-22a. The parties explicitly refrained from requiring Venetian to dedicate a public right-of-way to the State for a new public sidewalk. Instead, the agreement calls for Venetian to "construct and maintain on *its* property along Las Vegas Boulevard South a *private* sidewalk connecting to public sidewalks on either side of its property." *Id.* at 20a (¶ 1) (emphasis added). Every subsequent reference to the sidewalk explicitly reaffirms that it is "private." *See id.* at 20a-21a. To reinforce that the sidewalk is fully "private" and that there was no dedication of the sidewalk to the State, the agreement emphasizes that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," and that the State "is not taking any private property interest with this document." *Id.* at 21a, 22a (¶¶ 1, 6).

The agreement also reflects in several additional respects the private nature of the sidewalk and the absence of any

dedication of the sidewalk to the State. For instance, the agreement assigns to Venetian exclusive responsibility for "keep[ing] and maintain[ing]" its "private sidewalk" at "all times in an orderly, clean, safe, and sanitary condition" at its "sole expense," and requires Venetian to "absolve, indemnify, and defend" the State "from any and all cost, expense, or liability arising from the . . . use of the private sidewalk." App. 20a (¶¶ 4, 5). The agreement also treats Venetian's private sidewalk like any other private sidewalk fronting a privately owned place of public accommodation, obligating Venetian to "satisfy the Americans with Disabilities Act" requirements applicable to all such public accommodations – *i.e.*, that "pedestrian access" along the "private sidewalk" be "unobstructed." *Id.* (¶ 1). Finally, the agreement contemplates only one situation in which Venetian might be required – in the future – to relinquish its property rights and to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk: if, and only if, the "private sidewalk" were to be "removed, altered, or abandoned." *Id.* at 21a (¶ 7).

3. In February 1999, the public sidewalk formerly running alongside Las Vegas Boulevard was demolished to enable construction of the new traffic lane. Venetian built a temporary private sidewalk on its property adjacent to the widened roadway where the private sidewalk described in the 1999 Agreement soon would be constructed. The company subsequently became aware that respondents Local Joint Executive Board of Las Vegas, Culinary Workers, Union Local No. 226 and Bartenders Union, Local No. 165 (the "Unions"), planned to hold a demonstration at the Venetian property to protest the company's labor policies. The County granted the Unions a permit allowing them to conduct a demonstration on March 1, 1999, on Las Vegas Boulevard in front of the Venetian and on the surrounding sidewalks. In anticipation of the demonstration, Venetian clearly marked its property lines and posted signs identifying the private sidewalk as its private property. App. 4a.

The demonstration went forward as planned, with more than 1,300 persons participating in various activities – including organized picketing – that extended onto Venetian's private sidewalk. When the demonstrators refused to abandon the sidewalk, Venetian sought the assistance of local authorities to confine the demonstration to the adjacent public street and the public sidewalks on either side. But respondents Clark County, District Attorney Stewart L. Bell, and the Las Vegas Metropolitan Police Department (the "Government Officials"), refused to intervene, based on a belief that Venetian's private sidewalk – although private property – was a "public forum" for First Amendment activity. The Unions later expressed plans to organize further demonstrations on the private sidewalk. App. 4a.

In response, Venetian filed this action against the Government Officials and Unions, alleging that their refusal to recognize and enforce Venetian's property rights constructively converted its private property into a public forum, and seeking a declaratory judgment that its private sidewalk was not a public forum and that the Government Officials' and Unions' actions amounted to a taking of its property interests in violation of the Due Process Clause. Venetian then filed a motion for a preliminary injunction seeking to bar the Government Officials from authorizing demonstrations on its property and from refusing to enforce its property rights. Respondent ACLU intervened, and filed a counterclaim seeking a declaratory judgment that Venetian's private sidewalk is a public forum for First Amendment activity.

B. Decisions Below.

1. a. The district court denied Venetian's motion for a preliminary injunction. App. 47a-61a. Significantly, the court agreed with Venetian that the sidewalk was its private property and that it had not "waived its right to exclude." App. 57a. But the court nonetheless rejected Venetian's contention that, as a private entity, its control of its private side-

walk was not subject to the First Amendment. The court acknowledged the "general rule" that the "Constitution does not apply to private conduct." *Id.* at 59a. Relying on *Marsh v. Alabama*, 326 U.S. 501 (1946), however, the court determined that Venetian's performance of an "exclusive governmental function," *i.e.*, that of "owning and maintaining" a sidewalk that runs alongside a major public street and serves the needs of the public, rendered it a state actor. *Id.* at 60a. The court thus held that Venetian's control of its private sidewalk was subject to the same standards that restrict the government's control of a public sidewalk – *viz.*, Venetian could only impose "content neutral and reasonable time, place, and manner restrictions." *Id.* at 61a.

b. The district court later denied Venetian's motion for summary judgment, ruling that its order denying a preliminary injunction had disposed of the issues. App. 41a-46a. The court then granted judgment in favor of respondents, including on respondent ACLU's counterclaim. *Id.* at 39a-40a.

2. a. A divided panel of the Ninth Circuit affirmed. Rather than addressing the issue decided by the district court – *i.e.*, whether Venetian can be considered a state actor bound by the First Amendment—the panel majority framed the "question . . . presented [on] appeal" as "whether a sidewalk constructed on private property to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, is a public forum." App. 2a. Strictly adhering to that question, the opinion eschews any analysis of whether Venetian can properly be treated as a state actor, focusing instead solely on whether Venetian's private sidewalk bears the characteristics of a "public forum" within the meaning of that familiar First Amendment doctrine.

The majority applied a number of factors used by courts to determine whether property is a "public forum." First, the majority considered whether the property had historically

been used as a public forum for expression. App. 10a-11a. While it was true that the land on which Venetian's private sidewalk sits has always been private property, *id.* at 10a, the majority reasoned, "[i]t is the historical use of the sidewalk adjacent to Las Vegas Boulevard that is significant, not the piece of land on which the replacement sidewalk is located." *Id.* at 11a. And it was undisputed, the majority noted, that the sidewalk previously existing on public property was a public forum. *Id.*

Second, the majority weighed whether the property's physical location and functional characteristics were suggestive of a public forum. App. 11a-13a. The majority observed in that regard that the "newly constructed sidewalk still performs the same role as a thoroughfare for pedestrian traffic along Las Vegas Boulevard," in reliance on public forum decisions distinguishing public sidewalks that function as a thoroughfare from public sidewalks that only allow ingress and egress to and from public facilities. *Id.* at 12a. In addition, the majority believed, there was "little to distinguish" Venetian's private sidewalk from the adjoining public sidewalks. *Id.* at 13a. The majority accepted that the Venetian sidewalk contains distinctive paving patterns and color schemes matching the large plaza area that runs seamlessly from the sidewalk to the hotel-casino. *Id.* But the majority found significant that "there are no barriers or other physical boundaries" indicating that Venetian's private sidewalk is a "special type of enclave" with a "different legal status" from the public sidewalks on either side. *Id.* (internal quotation marks omitted).

Third, the majority assessed whether Venetian had dedicated its sidewalk to the public. App. 14a-16a. The majority looked to the terms of the 1999 Agreement for evidence of a dedication. But the majority made clear that its reading of the agreement was shaped by – and was "in th[e] context" of – its conclusion that the "function" of Venetian's private

sidewalk "was to be the same as the former public sidewalk in front of the Venetian and the [public] sidewalks connecting on either side." *Id.* at 7a. Having assumed that Venetian's private sidewalk was intended to serve precisely the same function as those public sidewalks, and also that the 1999 Agreement was designed to effectuate that intention, the majority found that Venetian's private sidewalk likewise had been dedicated to the State. *Id.* at 14a-16a. The majority reached that determination notwithstanding the numerous provisions in the 1999 Agreement confirming the absence of any such dedication, and notwithstanding the district court's conclusion that the 1999 Agreement did not grant the public a right of access.[1]

The majority summarized its analysis as follows: "Given the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas' network of public sidewalks, and its dedication to public use under [the] 1999 Agreement," "we conclude that the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment." App. 19a.

b. Judge Brunetti dissented. In his view, this case turns on the basic rule "that the First Amendment only applies to state actors" and affords no "protection or redress against

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[1] The majority opinion pointed to the requirements that Venetian: (1) connect its "private sidewalk" to the "public sidewalks" on either side; (2) satisfy the ADA's requirement that "pedestrian access" along the sidewalk be "unobstructed,"; (3) remove improvements on the sidewalk that present a "hazard or obstruction" to pedestrian traffic; and (4) "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk *in the future* should the "private sidewalk" ever be "removed, altered, or abandoned." App. 14a-15a. According to the majority, those provisions, "[r]ead together" and considered in the context of the assumptions that governed its interpretation of the agreement, "constitute a dedication of the sidewalk" to the public *at the present*. *Id.* at 15a.

abridgement of free expression by private" entities. App. 37a. The majority "ignores this fundamental axiom," Judge Brunetti explains, and "applies the First Amendment to a private corporation's regulation of its own private sidewalk." *Id.* "To arrive at this curious result," the dissent observes, "the majority relies on case law which does not address the issue of state action, but rather focuses on whether private land can be a public forum, an issue that we can only reach *after* finding a state actor." *Id.* (emphasis added).

In particular, the dissent explains, the circumstances call for a "two-step inquiry:" first, a determination whether the private property owner can be treated as a state actor; and second, and only if so, an analysis of the particular "forum at issue" to establish the relevant First Amendment standards. App. 25a (citation omitted). By skipping ahead to the second step without resolving the first, the majority "broadens the scope of who is a state actor," because "private pieace of property of a type traditionally owned and operated by the public or . . . used in a manner traditionally associated with the public will presumptively satisfy the state action requirement." *Id.* at 31a-32a. The result, in the view of the dissent, is to "undercut[] the ability of private actors to negotiate and determine the rights that apply to their property, if that piece of property happens to be space traditionally construed as public." *Id.* at 32a. Here, for instance, the majority interprets the 1999 Agreement in a "nonsensical" manner, "cobbling together a dedication from various provisions in the contract, while ignoring the great weight of the contractual language demanding the opposite conclusion." *Id.* at 34a-35a. The upshot of the majority's approach, according to the dissent, is to "extend[] the First Amendment far beyond its intended reach and [to] undermine the rights of private property owners." *Id.* at 38a.

c. The Ninth Circuit denied the petition for rehearing and rehearing en banc, but Judge Brunetti voted to grant re-

hearing and recommended granting the suggestion for rehearing en banc. App. 62a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S APPROACH TO DETERMINING WHETHER A PRIVATE ENTITY'S CONTROL OF ITS PROPERTY IS SUBJECT TO THE FIRST AMENDMENT CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

The opinion below eschews any conventional analysis of state action – indeed, the words "state action" appear nowhere in the majority's analysis – focusing instead exclusively on whether Venetian's private sidewalk bears the attributes of a "public forum." In the Ninth Circuit's view, if Venetian's private sidewalk sufficiently resembles a "public forum" sidewalk, then Venetian's control of the sidewalk constitutes state action subject to the First Amendment.

That analysis is deeply flawed. Public forum doctrine establishes the rules for assessing the validity under the First Amendment of a *governmental* restriction of speech on property that the *government* controls. The basic principle is that the government faces greater constraints when regulating speech in a "public forum" for expressive activity and enjoys greater leeway when regulating speech in a "nonpublic forum." *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-79 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983). Public forum analysis thus presupposes a restriction of speech *by the government*, and merely determines which First Amendment standards apply to that restriction based on the characteristics of the property at issue.[2] Public

[2] *See Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2099 (2001) ("The standards that we apply to determine whether a *State* has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum.") (emphasis added); *Lee*, 505 U.S. at

forum doctrine has never been used – at least until the Ninth Circuit's decision below – to resolve the antecedent question whether governmental action is involved *at all*.

In fact, several courts have specifically rejected the analysis adopted by the Ninth Circuit, ruling that public forum analysis is entirely irrelevant to the threshold question of state action. The issue of state action instead is controlled by *Marsh v. Alabama*, 326 U.S. 501 (1946), and its progeny, according to which a private entity's control of its own private property can be deemed state action subject to the First Amendment only in extremely rare circumstances involving the functional equivalent of an entire municipality, *i.e.*, a "company town." The opinion below is incompatible with the decisions establishing and applying that well-settled doctrine. The conflict between the approaches is made especially clear by a recent opinion of the Nevada Supreme Court, which reaches the opposite result from the Ninth Circuit's below in literally parallel circumstances involving the private sidewalk directly across the street from Venetian's.

A. Several Courts Reject The Relevance Of Public Forum Analysis To The Threshold Question Of State Action.

The Ninth Circuit's holding that Venetian is constrained by the First Amendment when controlling its private sidewalk was based on several factors relevant to determining whether a governmental restriction of speech takes place in a "public forum" or in a "nonpublic forum." In particular, the court emphasized the historical use as a public forum of the public sidewalk previously existing in the State right-of-way,

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678 ("These cases reflect . . . a 'forum based' approach for assessing restrictions that the *government* seeks to place on the use of *its* property.") (emphasis added); *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 800 (1985) ("[T]he extent to which the *Government* can control access depends on the nature of the relevant forum.") (emphasis added).

the continued use of Venetian's private sidewalk as a pedestrian thoroughfare, the absence of physical barriers separating Venetian's private sidewalk from the adjoining public sidewalks, and the ostensible dedication of Venetian's sidewalk to the State. *See* App. 17a, 19a. The Ninth Circuit thus inferred that Venetian was a state actor subject to the First Amendment from the conclusion that its private property possesses the characteristics of a "public forum."

A number of courts correctly reject that approach, holding that public forum analysis is irrelevant to the threshold question of state action. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 782-83 (1996) (op. of Kennedy, J.) (explaining first why "state action" exists, and describing "*the next step*" as determining through public forum analysis "what standard ... applies to determine whether the state action conforms to the First Amendment") (emphasis added). For instance, the D.C. Circuit has held that the "essential element" of "state action" "cannot be supplied by treating" the property in question as a "public forum[]." *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995), *aff'd in part, rev'd in part on other grounds sub nom., Denver Area*, 518 U.S. at 727.[3] The court rejected the notion that establishing the existence of a "public forum" could "avoid the state action problem." *Id.* at 121. A "'public forum,' or even a 'nonpublic forum,' in First Amendment parlance," the court explained, "is government property." *Id.* And state action necessarily "is present," as "the property is the government's and the government is doing the restricting." *Id.* Because public forum

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[3] Although this Court subsequently disagreed with the D.C. Circuit's determination that there was no state action involved in the case, the Court did not question the D.C. Circuit's conclusion that state action could not be found on the basis of public forum analysis. Instead, the requisite state action took the form of a federal statute. *See Denver Area*, 518 U.S. at 737 (plurality); *id.* at 782 (op. of Kennedy, J.).

standards thus *assume* state action, they cannot also be used to determine the existence of state action. *See id.* at 121-23.

The Seventh Circuit's decision in *Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998), is to the same effect. That case addressed the validity of speech restrictions imposed in a public pier area. Because the pier authority that owned and controlled the pier was a governmental body, its regulation of expressive activity in the pier area clearly constituted state action. The court therefore properly applied public forum analysis to the pier authority's restrictions, ultimately relying on the same distinction between thoroughfare and non-thoroughfare public sidewalks central to the Ninth Circuit's decision below. *See id.* at 702; *see also* App. 12a (citing *Chicago Acorn*). But Judge Posner's opinion for the court prefaced the application of public forum standards with the recognition that the "pier if *privately* owned would not fall within the 'company town' exception . . . to the rule that the First Amendment constrains only government action." *Id.* at 699 (emphasis added). According to the Seventh Circuit, public forum doctrine – including the distinction between thoroughfare and non-thoroughfare sidewalks – thus is wholly irrelevant in the case of a "private entity," which has "a free hand in deciding whom to admit to its property and on what terms." *Id.*

State supreme courts are in accord, likewise concluding that public forum principles have no bearing on the threshold question of state action. For instance, the Oregon Supreme Court, after canvassing this Court's decisions addressing when a private entity's control of its property implicates the First Amendment, summarized the law as follows: "in determining whether the First Amendment protects petitioning or other political activity on private property, *the test is not whether that property amounts to the 'functional equivalent' of a public forum.*" *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) (emphasis added). Having flatly re-

jected the *exact* approach adopted by the Ninth Circuit below, the court then explained: "Rather, a court must determine whether, under the facts of the particular case, it could be said that state action implicating the First Amendment has occurred." *Id.*; *see also City of Jamestown v. Beneda*, 477 N.W.2d 830, 835 (N.D. 1991) ("First, we must determine whether the regulation of appellants' expressive activity by the Jamestown Mall constitutes state action. Second, if state action is involved, we must then characterize the forum involved to establish the constitutional standard by which we judge the mall's regulation of expressive activity.").[4]

In short, a number of courts, in direct disagreement with the Ninth Circuit below, specifically reject the application of public forum doctrine to determine whether a private entity's control of its own private property can be considered state action subject to the First Amendment.[5] That difference in

[4] A number of federal district courts and lower state courts have also held that public forum analysis is irrelevant to the antecedent question of state action. *See Rouse v. City of Aurora*, 901 F. Supp. 1533, 1538 (D. Colo. 1995); *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 68 (D. Mass. 1990); *State v. Scholberg*, 412 N.W.2d 339, 342-43 (Minn. Ct. App. 1987); *cf. SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1217-18 (N.Y. Ct. App. 1985).

[5] The public forum decisions relied upon by the Ninth Circuit below in no way suggest otherwise. Each of those cases plainly involved government action, and applied public forum rules to assess the constitutionality of that government action. For instance, the opinion below principally relies on *Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000). *See* App. 9a-10a, 11a, 14a. That case involved no threshold question of state action, however: it addressed whether a *municipality*'s actions amount to unconstitutional endorsement of religion. *See id.* at 497. *See also International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (public port authority regulations); *United States v. Kokinda*, 497 U.S. 720 (1990) (postal service regulation); *United States v. Grace*, 461 U.S. 171 (1983) (federal statute).

approach necessarily translates into a difference in results. That is because, as we discuss next, in courts outside the Ninth Circuit – *i.e.*, where public forum doctrine has no relevance to the threshold question of state action – a private entity's control of its own private property can constitute state action only in rare circumstances involving a "company town" or its functional equivalent.

B. The Ninth Circuit's Opinion Cannot Be Squared With This Court's Controlling State Action Decisions.

This Court's state action decisions address precisely the same question considered by the Ninth Circuit below – *viz.*, "[u]nder what circumstances can private property be treated as though it were public?" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978). The Court's answer is unequivocal: "when that property has taken on *all* the attributes of a town, *i.e.*, residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block on which business places are located." *Id.* (emphasis in original) (internal quotation marks omitted). That "company town" exception was established in *Marsh v. Alabama*, 326 U.S. 501 (1946). But the Court's subsequent state action decisions limit *Marsh* to its unique circumstances, and the rule is now well-settled: a private entity's control of its own property can be considered state action in only one, exceptionally narrow situation – when the entity controls the functional equivalent of an entire municipality. *See Flagg Bros.*, 436 U.S. at 159; *Hudgens v. NLRB*, 424 U.S. 507, 513-21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 561-63, 569 (1972).[6]

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[6] At the time of the Court's decision in *Marsh*, "[m]any people in the United States live[d] in company-owned towns," and there was substantial evidence of "suppression of civil liberties in company towns and the need of those who live there for Constitutional protection." *Marsh*, 326 U.S. at 504, 509 n.6; *see* 4 Encyclopaedia of the Social Sciences, at 122-23 (E. Seligman ed. 1935) ("It is evident that for isolated non-union company towns, in which the employer owns all the land, no effective

Contrary to the view of the Ninth Circuit, therefore, the mere fact that a particular private sidewalk resembles a public sidewalk in its functional and physical attributes does not suffice to render the private owner subject to the First Amendment. *See Lee*, 505 U.S. at 698 (Kennedy, J., concurring) ("private spaces of similar character" to public spaces "are not subject to the dictates of the First Amendment"); *Tanner*, 407 U.S. at 563 (rejecting "suggestion that privately owned streets and sidewalks of a business district . . . are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"); *id.* at 569. As this Court has explained, there is "nothing in *Marsh* which indicates that if [only] one of the[] features [of a town] is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (internal quotation marks omitted). That statement captures the situation in this case to the letter, except that here not even an entire "business district" is at issue: the Ninth Circuit's decision "confiscates a part of an owner's private property" – Venetian's private sidewalk – "and gives its use to people who want to picket on it."

In contrast to the opinion below, accordingly, other courts of appeals have applied the straightforward "company

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steps have been taken to obtain for the employees the practise of those 'immemorial rights' of free speech and free assemblage which are supposedly guaranteed by federal and state constitutions. . . . Democracy is an empty mockery."). In the company town in *Marsh*, the Court has explained, "there were no publicly owned streets, sidewalks, or parks where [First Amendment] rights could be exercised," *Tanner*, 407 U.S. at 562, and the decision has no application where citizens enjoy a "wider number of choices" of venues for expressive activity than was available to one "who wished to distribute literature in Chickasaw, Ala., at the time that *Marsh* was decided," *Flagg Bros.*, 436 U.S. at 162. That of course is true of Las Vegas, and also of the Venetian property, which is surrounded by a number of public streets and sidewalks.

town" principle without pausing to assess whether the particular private property in question functionally resembles public property. *See Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238 (1st Cir. 1981). *See also Chicago Acorn*, 150 F.3d at 699 (7th Cir.) (private owner cannot be treated as a state actor under "the 'company town' exception of *Marsh v. Alabama*" if private property "is not a town"); *United Auto Workers, Inc. v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 (4th Cir. 1995) ("state action can only be found on the authority of *Marsh* where a private enterprise assumes *all* the attributes of a state-created municipality and performs the *full* spectrum of municipal powers") (alteration and internal quotation marks omitted) (emphasis in original). In addition, numerous lower courts have held that a private entity's regulation of speech on its own private sidewalk or street is unconstrained by the First Amendment.[7]

The only response of the Ninth Circuit below is to assert that "none of the cases" involve "privately-owned property [that] possess[es] all the attributes of a public forum," – *viz*, "a 'thoroughfare sidewalk,' seamlessly connected to public sidewalks at either end and intended for general public use." App. 18a. As we have seen, however, the Ninth Circuit stands alone in believing that public forum considerations of that kind are relevant to the question whether a private entity's control of its own property is state action. In addition, the state action decisions of this Court and other courts flatly reject the Ninth Circuit's suggestion that the use of private property by the public in general bears on whether the owner can be considered a state actor. *See Rendell-Baker v. Kohn*,

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[7] *See, e.g., Garrison v. City of Lakeland*, 954 F. Supp. 246 (M.D. Fla. 1997); *Rouse v. City of Aurora*, 901 F. Supp. 1533 (D. Colo. 1995); *Local 32B-32J Serv. Employees Int'l Union v. Port Auth.*, 462 F. Supp. 852 (S.D.N.Y. 1978); *International Soc'y for Krishna Consciousness v. Reber*, 454 F. Supp. 1385, 1390 (C.D. Cal. 1978).

457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action."); *Gaston Festivals, Inc.*, 43 F.3d at 909 ("It is not enough to establish state action . . . that an owner opens up his property for use by the public in general.") (internal quotation marks omitted). The conflict between the decision of the Ninth Circuit below and the state action decisions of this Court and other courts warrants the Court's review.

C. The Ninth Circuit's Opinion Conflicts With An Opinion Of The Nevada Supreme Court Addressing The Same Issues In Parallel Circumstances.

The Ninth Circuit's opinion conflicts most directly with the Nevada Supreme Court's decision in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Sup. Ct. R. 10(b).[8] *S.O.C.* addresses whether the public enjoys First Amendment rights on a privately-owned sidewalk fronting the Mirage Hotel, a sidewalk described as located "directly across the street from, and in every relevant respect identical to" Venetian's private sidewalk. *Id.* at 252 (Maupin, C.J., concurring in result). The principal opinion in *S.O.C.* holds that the Mirage Hotel is not a state actor, and therefore "cannot be held to the Constitutional requirements of the First Amendment" when controlling the distribution of leaflets on its private sidewalk. *Id.* at 247-48.[9] The opinion treats the

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[8] Venetian brought the decision in *S.O.C.* to the panel's attention in a letter filed with the court on May 21, 2001, pursuant to Fed. R. App. P. 28(j). The panel's opinion, which was issued on July 12, 2001, nevertheless does not address – or even mention – the Nevada Supreme Court's decision in *S.O.C.*

[9] Three Justices joined in the opinion, two Justices issued an opinion concurring in the result, and one Justice dissented. The court's principal opinion is viewed by both the concurrence and dissent to establish a "majority" holding. *See id.* at 252 (Maupin, C.J., concurring "in the majority's result"); *id.* at 252, 253, 254 & n.8 (Ross, J., dissenting) (disagreeing with the decision of the "the majority").

case as a straightforward application of this Court's state action decisions, reasoning that "*Marsh* has been consistently interpreted to apply to a very narrow set of facts where the entity in question performed the full spectrum of municipal powers." *Id.* at 248 (internal quotation marks omitted). And the opinion specifically rejects the argument that public forum analysis might compel a different result, explaining that, although the public might use the Mirage's private sidewalk as a pedestrian thoroughfare, "private property does not lose its private nature because it is open to the public." *Id.* at 249.

The opinion of the Nevada Supreme Court in *S.O.C.* creates a concrete conflict with the Ninth Circuit's decision in an unusually literal sense.[10] All of the "public forum" considerations relied on by the Ninth Circuit for concluding that Venetian's control of its private sidewalk is subject to the First Amendment would apply equally to the Mirage's private sidewalk located directly across the street. But opposite constitutional rules now apply to the two parallel sidewalks. If anything, in fact, the Mirage should more readily be found subject to the First Amendment than Venetian, because the Mirage sidewalk – unlike Venetian's – is explicitly encumbered by a public right-of-way for pedestrian passage. *See id.* at 245; p. 26, *infra*. The conflict between the two opinions and the broader conflicts resulting from the Ninth Circuit's decision can only be resolved by this Court.

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[10] *Cf. Mirage wins rulings*, Las Vegas Sun, Oct. 3, 2001 (the "decision by the [Nevada] Supreme Court [in *S.O.C.*] conflicts with one by the 9th U.S. Circuit Court of Appeals that ruled that the private sidewalk across the street at the Venetian hotel-casino was public and the Culinary Union had a constitutional right to demonstrate on it") (available at www.lasvegassun.com/sunbin/stories/text/2001/oct/03/512437560.html).

II. THE OPINION BELOW ENTAILS SIGNIFICANT IMPLICATIONS FOR THE BASIC RIGHTS AND EXPECTATIONS OF PROPERTY OWNERS.

A. The Ninth Circuit's Approach Impairs The Most Basic Rights Of Private Property Ownership.

The decision below entails substantial implications for the fundamental rights and expectations of private property owners throughout the Ninth Circuit. The most basic right of private property ownership is the right to exclude objectionable uses. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). But the majority's ruling "greatly undermine[s] private property rights," by forcing private entities to permit highly disruptive and objectionable uses of their property by the public if the property is deemed "of a type traditionally owned and operated by the public" or is "used in a manner traditionally associated with the public." App. 32a (Brunetti, J., dissenting).

The implications of the opinion below are especially severe where, as in this case, a private entity is forced to make room on its own private property for picketing and protests deliberately designed to injure its own interests. This Court's decisions speak directly to that situation: "To hold that store owners are compelled by [the First Amendment] to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Hudgens*, 424 U.S. at 517 (internal quotation marks omitted). That is precisely the result of the Ninth Circuit's decision below, however. In fact, by requiring Venetian to host expressive activity calculated to undermine its own interests, the Ninth Circuit infringes Venetian's *own* First Amendment right to refuse the "use [of] *its* property as a vehicle for spreading a message with which it disagrees." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 17 (1986) (plurality) (emphasis in original).

Of course, if the public requires unrestricted access to Venetian's private sidewalk for expressive activity, the State always retains its full authority to convert the sidewalk into public property at any time by exercising the power of eminent domain. In fact, this Court has observed – in respect to precisely the property interest that would be relevant here, *i.e.*, a "public easement across a landowner's premises" – that "one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). But the effect of the Ninth Circuit's below is to convert Venetian's private sidewalk into public property without payment of any compensation at all. That result strikes at the heart of the basic rights of a property owner. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land . . . for public use, . . . a taking would have occurred. Such public access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citations and internal quotation marks omitted).[11]

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[11] The Ninth Circuit's recognition of a First Amendment right-of-access to Venetian's property also stands in substantial tension with *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in the circumstances of this case. *Lechmere* establishes that non-employee union organizers have no right under the federal labor laws to access an employer's private property for expressive activity, "*except* in the rare case where the inaccessibility of employees makes ineffective" the normal means of communication, as in an isolated logging or mining camp. *Id.* at 537-40. Under *Lechmere*, the federal labor laws of course afford union organizers no right to access Venetian's private property, and the Ninth Circuit has said so in precisely analogous circumstances. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 996-98 (9th Cir. 1992) (holding union members have no *Lechmere* right to access hotel-casino's private driveway). But the Ninth Circuit's decision below effectively nullifies that body of law

B. The Ninth Circuit's Approach Prevents Private Owners From Negotiating The Protection Of Their Property Rights.

The opinion below is particularly troubling because it undermines the ability of private property owners to "negotiate and determine the rights that apply to their property." App. 32a (Brunetti, J., dissenting). The Ninth Circuit's misconceived "public forum"-based approach gives short shrift to the unambiguous intentions of Venetian and the State in two respects: first, by taking into account the parties' negotiated resolution only to the extent it informs one of the many "public forum" considerations that resulted in treatment of the private sidewalk as public property; and second, even insofar as the parties' intentions weighed into determining whether the private sidewalk had been "dedicated to public use," by disregarding – and, in fact, inverting – the explicit and unequivocal terms of the 1999 Agreement. In view of the court's refusal to give effect to the parties' unmistakable intentions in the 1999 Agreement, the upshot of the opinion below is that, no matter how explicitly and clearly a private entity preserves its property rights, it nonetheless will be deemed a state actor constrained by the First Amendment whenever its property can be seen functionally to resemble a "public forum."

1. Although the majority purports to locate a "dedication" of Venetian's sidewalk to the public in the 1999 Agreement, *see* App. 14a-15a, that suggestion cannot be taken seriously. A "dedication" requires "proof of an intention on the part of the owner of land to donate it to the local government, and an acceptance thereof by the local government." 2 Stevenson, Antieau on Local Government Law, § 30.05[1] (2d ed. 2000). And when a property owner dedi-

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as it applies to Venetian's private sidewalk by granting union members a right-of-access under the First Amendment.

cates a sidewalk, the government acquires a right-of-way easement across the land. *See* 11A McQuillen, Municipal Corporations § 33.68 (2000). *See also Denver Area*, 518 U.S. at 827 (op. of Thomas, J.) (dedication of property to public use "create[s] enforceable public easement[] in the dedicated land"). An intent to dedicate property "must be clearly and unequivocally manifested." 11A McQuillen, *supra*, § 33.68 (2000); *see, e.g., Shearer v. City of Reno*, 136 P. 705, 707 (Nev. 1913).

Here, however, the clear and unequivocal intent of the parties was *not* to dedicate Venetian's sidewalk to the public. To begin with, the agreement explicitly distinguishes between Venetian's "private sidewalk" and the adjoining "public sidewalks," App. 20a (¶ 1), confirming that the latter – as to which the State does possess a right-of-way – differ categorically from the former. In fact, the agreement's unfailing use of "private" to describe Venetian's sidewalk is fully dispositive in establishing the absence of a dedication: it is black-letter property law that "[r]eservation of land as a private way conclusively negatives an intent to dedicate a tract as a public street." 2 Antieau, *supra*, § 30.05[4].[12]

The parties underscored their intention not to dedicate the sidewalk throughout the agreement. For instance, although dedication of a sidewalk to the public results in transfer of a right-of-way easement to the government, *see* 11A McQuillen, *supra*, § 33.68, the 1999 Agreement contemplates only that Venetian might be required *in the future* to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk, if, and only if, Venetian ever "removed, al-

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[12] *Freedom from Religion Foundation v. City of Marshfield*, the decision principally relied on by the majority in finding a dedication to public use, *see* App. 14a, is instructive. In that case, the parcel of land was subject to a restriction requiring its use for "*public* park purposes." 203 F.3d at 490 (emphasis added); *see id.* at 494, justifying the conclusion that the "land [was] dedicated to public use," *id.* at 494.

tered, or abandoned" its "private sidewalk." App. 21a (¶ 7). That provision establishes beyond doubt that no such dedication could already have occurred in the 1999 Agreement. That is confirmed by the provisions making clear that the State "is not taking any private property interest with this document" and that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," App. 21a-22a (¶¶ 1, 6), neither of which could be consistent with the dedication of a right-of-way to the State.

Finally, Venetian shoulders exclusive responsibility for "maintaining" the "private sidewalk" in "an orderly, clean, safe, and sanitary condition," bears "all cost, expense, or liability arising from" the sidewalk's use, App. 20a (¶¶ 4, 5), and continues to pay property taxes on the land, all of which is incompatible with dedication of a public sidewalk and acceptance of the dedication by the State. *See* 39 Am. Jur. 2d, Highways, § 94 (1999) ("primary duty of maintaining the entire area of a sidewalk . . . dedicated for public use . . . in reasonable repair for the use of pedestrians, rests upon the municipality, and not upon the owner"); 11A McQuillen, *supra*, § 33.53 ("levy and collection of general and special taxes . . . indicates an intention not to accept" dedication). In short, it is hard to imagine how the parties could more clearly have expressed their intention not to dedicate the sidewalk to the public.

In the teeth of all of those provisions, the opinion below nevertheless finds the requisite unequivocal intent to make a dedication, pointing principally to language requiring that the "private sidewalk . . . satisfy the Americans with Disabilities Act" by "providing unobstructed pedestrian access." App. 20a (¶ 1). But that provision, as the dissent explains, App. 35a-36a, simply echoes the requirement in the ADA regulations that all private entities operating a place of public accommodation provide an "unobstructed way of pedestrian

passage" from any "exterior approach . . . including sidewalks." 28 C.F.R. § 36.403(e)(1). And the reference to "unobstructed pedestrian access" – especially when considered in the context of the ADA's parallel language – plainly concerns physical "obstructions," not discretionary decisions by the owner to regulate certain uses. *See* Black's Law Dictionary 1077 (6th ed. 1990) (defining "obstruct a road or way" as "to fill with barricades or impediments"). That is confirmed by the separate provision requiring Venetian to "remove" any "improvements" that become an "obstruction" to "pedestrian or vehicular traffic." App. 21a (¶ 8).[13]

2. In any case, even assuming the reference in the ADA provision to "unobstructed pedestrian access" somehow establishes an unequivocal intention to dedicate a pedestrian right-of-way to the State, the circumstances still would involve a direct conflict with the Nevada Supreme Court's decision in *S.O.C.* There, the Mirage Hotel had explicitly conveyed a "perpetual pedestrian easement" to the government in its zoning and building plan, 23 P.3d at 245, but the court nonetheless found that "the mere existence of the easement does not implicate the protections of the First Amendment."

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[13] In discussing its interpretation of the agreement, the panel "notes" selected responses of Venetian's counsel in a hearing in the district court. *See* App. 14a. But any reliance on those statements, as the dissent observes, "creat[es] the proverbial mountain out of a molehill." App. 35a. In Nevada – as elsewhere – the "extent of . . . any conveyance of rights in real property, is fixed by the language of the instrument," *S.O.C.*, 23 P.3d at 246, not by responses in court. In any event, counsel emphasized in the same hearing that the sidewalk "has not . . . been dedicated to public use" and that it was "clear that there has been no dedication." Unions' Supp. Exc. Rec. 151, 154 (filed in 9th Cir.) (quoting transcript). Other statements that might incorrectly have suggested a contrary understanding of course cannot alter the agreement's legal effect. That is particularly the case given that the district court placed no weight on the statements, instead holding correctly that Venetian had not "waived its right to exclude." App. 57a.

Id. at 246. In the court's view, a "party is privileged to use another's land only to the extent expressly allowed by the easement," and "the easement, by its express language, is limited to pedestrian uses of the sidewalk to travel from point A to point B." *Id.* at 247. As a result, "the existence of the easement . . . does not transform private property into a public forum for constitutional scrutiny." *Id.* at 247. Because the opinion below finds that Venetian's private sidewalk *is* a "public forum for constitutional scrutiny," it presents a direct conflict with *S.O.C.* even assuming Venetian somehow *did* dedicate a pedestrian right-of-way.

But the Court's review is particularly warranted because of the broader implications of the Ninth Circuit's analysis for the settled expectations of property owners. The "public forum" approach of the opinion below entails giving the parties' explicitly stated intentions no more weight than such factors as whether the court deems the private property to physically resemble public property or whether the court considers the private owner to have taken adequate measures to structurally distinguish its property; and even then, the court effectively inverts the clear terms of the parties' agreement. Indeed, the majority allows that its construction of the agreement is shaped by its assumption that the private sidewalk was to have precisely the same public function as the public sidewalk previously existing within the State's right-of-way. App. 7a.

But the plain terms of the 1999 Agreement require Venetian to "construct and maintain" a "*private* sidewalk," on "*its* property," App. 20a (¶ 1) (emphasis added), which is a site-specific land use condition of the kind frequently found in agreements between developers and government authorities. *See* 3 E. Ziegler, Rathkopf's The Law of Zoning and Planning, ch. 40 (4th ed. 1999). The requirement is precisely analogous, for instance, to a condition that a property owner construct a parking lot or an access lane at a particular loca-

tion on the site to ameliorate traffic issues arising out of a proposed development. *See* 5 Ziegler, *supra*, ch. 58. Of course, both parties to the 1999 Agreement envisioned that the public generally would use Venetian's "private sidewalk" for pedestrian transit. After all, it is in Venetian's clear commercial interest to maximize pedestrian access to its hotel-casino frontage. But an "intent to dedicate is not shown by the act of the owner of land in establishing a private way . . . even though the way is also used by the public generally without objection by the owner." 11A McQuillen, *supra*, § 33.32. That is precisely the situation here.

The State, understanding that both parties shared an interest in promoting ample pedestrian access, but doubtless also taking into account the significant advantages of avoiding the costs, burdens, and liabilities associated with maintaining a public sidewalk, agreed to let Venetian control and maintain a "private" sidewalk rather than to negotiate for dedication of a right-of-way. And the State of course understood that it could exercise the power of eminent domain at any time should the need to acquire a public sidewalk become necessary. But the opinion below simply ignores the bargain reached by the parties, somehow finding a dedication to the "public" in an agreement concerning a "private" sidewalk. *See* App. 25a (Brunetti, J., dissenting) (the "State should not be given by this court property rights it clearly bargained away," but "the majority does exactly that").

Because the majority opinion below ignores the plain terms of the governing agreement, reaching an interpretation at odds with the one adopted by the district court and acknowledged by parties on both sides of this case,[14] the opin-

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[14] *See* 57a (district court holding that Venetian has not "waived its right to exclude"); Venetian Supp. Exc. Rec. 223 (filed in 9th Cir.) (quoting Unions' acknowledgement in district court brief that 1999 Agreement "does not contain a requirement" that Venetian "give[] up the right to exclude unwanted pedestrians from its sidewalks"); Gov. Off. Resp. Br. 6

ion below effectively makes it impossible for a private entity in the Ninth Circuit to assure that it has preserved its basic rights of private property ownership. The outcome is harmful to governments as well, because the uncertainty surrounding whether the parties' intentions will be recognized complicates the ability of both government and private owners to transfer interests in land to one another. The effect of the majority's reasoning, in short, is to afford wide license to courts to convert private property into public property whenever the private property at issue bears the functional attributes of a public forum, even if the parties have clearly expressed an intention to the contrary.

C. The Ninth Circuit's Opinion Gives Rise To A Number Of Intractable Issues For Private Entities Deemed To Be Sovereigns.

The result of the Ninth Circuit's opinion is to designate Venetian a government actor limited to imposing reasonable and content-neutral time, place, and manner restrictions of speech on its own private sidewalk. *See* App. 61a. A host of intractable problems of implementation arise from the treatment of Venetian as a government entity. For instance, because Venetian in fact lacks sovereign powers, it is far from clear how it could effectively implement and enforce its time, place, and manner regulations. Unlike other sovereigns, Venetian has no police force or judicial system capable of enforcing its regulations. And if Venetian relied on self-help measures, would it be bound by the Fourth Amendment, even though it – unlike other sovereigns – might not enjoy qualified immunity from damages liability?

Venetian's ostensible status as a government entity might also affect its own exercise of First Amendment rights on its private property. That could raise especially difficult issues

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n.4 (filed in 9th Cir.) (stating that "Venetian sidewalk . . . is located on private property, not a public street or right-of-way").

where Venetian's free exercise and free speech rights as a private entity appear to collide with any Establishment Clause restrictions it might face as a government actor. For instance, if Venetian wished to display religious symbols on its private sidewalk, or to hold a religious celebration or function on the plaza area extending onto its private sidewalk, would its conduct merit protection under the Free Speech and Free Exercise Clauses, or face constraints under the Establishment Clause?

A separate set of problems arise from the ambiguity surrounding the relationship between Venetian and core sovereigns such as the State or County. It is unclear, for instance, whether Venetian would be required to coordinate its "governmental" policies with associated ones of the State or County. Accordingly, Venetian conceivably could promulgate time, place, and manner restrictions that are perfectly reasonable as a matter of law, but that bear no necessary relation to comparable restrictions of the County or State. For instance, Venetian could issue a permit to conduct a demonstration along its stretch of Las Vegas Boulevard for a different time or on a different day than the corresponding permit issued by the County.

Those various problems attest to the soundness of this Court's rule holding that a private entity's control of its own property cannot be considered state action unless it performs *all* the government functions of a town. The Ninth Circuit's refusal to adhere to that rule in the opinion below warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 00-15136

D.C. No. CV-99-00276-PMP

VENETIAN CASINO RESORT, L.L.C., a Delaware Limited Liability Company,

Plaintiff-Appellant,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; Culinary Workers Union, Local No. 226, an Unincorporated Association; Bartenders Union, Local No. 165, an Unincorporated Association; Clark County, a Political Subdivision of the State of Nevada; Stewart L. Bell, in his capacity as District Attorney of Clark County, Nevada; Las Vegas Metropolitan Police Department,

Defendants-Appellees

American Civil Liberties Union,

Intervenor-Appellee

Argued and Submitted July 18, 2000

Filed July 12, 2001

Appeal from the United States District Court for the District of Nevada; Philip M. Pro, District Judge, Presiding. D.C. No. CV-99-00276-PMP.

Before: SCHROEDER, Chief Judge, HUG and BRUNETTI, Circuit Judges.

Opinion by Judge HUG; Dissent by Judge BRUNETTI.

HUG, Circuit Judge:

The question we are presented with in this appeal is whether a sidewalk constructed on private property to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, is a public forum subject to the protections of the First Amendment. The Venetian Resort Casino sued Clark County, the Clark County District Attorney, and the Las Vegas Metropolitan Police Department (collectively, "the County"), seeking a declaratory judgment that the replacement sidewalk constructed on its property is not a public forum and an injunction requiring the County to recognize and enforce the Venetian's right to exclude labor union demonstrators from the sidewalk. The district court denied the Venetian's request for an injunction and granted summary judgment in favor of the County and intervenors, the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226, and Bartenders Union, Local No. 165 (collectively, "the Unions"), and the ACLU of Nevada. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Venetian Casino Resort is a large hotel and casino complex located on the former site of the Sands Casino on Las Vegas Boulevard South-"the Las Vegas Strip"-in Clark County, Nevada. As part of the approval process for demolishing the Sands and building the Venetian, the developers of the Venetian commissioned a study to determine the impact the new casino would have on traffic along Las Vegas Boulevard. The traffic impact study recommended widening Las Vegas Boulevard by one traffic lane along the Venetian frontage. In order to widen the roadway, however, the existing public sidewalk along the Venetian frontage would have

to be removed to make room. The new lane of traffic would completely fill the State of Nevada's right-of-way on Las Vegas Boulevard, leaving no remaining public right-of-way on which to construct a new public sidewalk. The sidewalk, therefore, would have to be relocated onto the Venetian's property.

The overall building permit required the approval of Clark County. Initial discussions concerning the widening of Las Vegas Boulevard and the replacement of the sidewalk were conducted with Clark County officials. However, because Las Vegas Boulevard is on a State right-of-way, the Venetian entered into negotiations with the State of Nevada Department of Transportation ("Department") to resolve the issue of continued pedestrian passage along Las Vegas Boulevard after the widening of the street. On January 8, 1999, shortly before the Venetian opened for business, the Venetian and Department entered into an agreement ("1999 Agreement"). It is this agreement that is at issue in this case.[1] The 1999 Agreement provides:

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[1] The entire agreement is attached as an addendum to this opinion.

> The [Venetian] shall construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property. The private sidewalk shall have a minimum width of ten feet and shall satisfy the Americans with Disabilities Act for the purpose of providing unobstructed pedestrian access.
>
> The Venetian further agreed to "remove or modify any of the [Venetian's] improvements at the [Venetian's] expense if they become a hazard or obstruction to either pedestrian or vehicular traffic, as reasonably determined by the DEPARTMENT," and to dedicate necessary right-of-way to the DEPARTMENT and to construct thereon a sidewalk, with a minimum width of ten feet, behind the curb and gutter and adjacent to Las Vegas Boulevard at the [Venetian's] expense should the private sidewalk be removed, altered, or abandoned, and to construct the sidewalk at least equal to the State's standards....
>
> The 1999 Agreement specifies that is to be recorded and that it is binding on the Venetian's "heirs ... successors and assigns."

In February 1999, the Venetian demolished the existing public sidewalk along Las Vegas Boulevard and constructed a temporary pedestrian walkway on its property.[2] Soon thereafter, the Unions applied for a permit to hold a demonstration in front of the Venetian.[3] The County issued a permit to the Unions on February 26, 1999. The permit authorized the Unions to hold a demonstration in front of the Venetian on the sidewalk and the inside traffic lane of Las Vegas Boulevard. When the Venetian learned of the planned demonstration, it hired a property surveyor to mark its property lines and erected signs stating that the pedestrian walkway was private property.

The Unions' demonstration took place on March 1, 1999. Approximately 1,300 people participated. During the demonstration, representatives of the Venetian issued warnings to the demonstrators that they were on private property. The Venetian also requested that the Las Vegas Metropolitan Police Department ("Police Department") remove the demonstrators from its property as trespassers. The Police Department, upon the advice of the Clark County District Attorney's Office, declined to issue citations or make any arrests. Following the demonstration, the Unions expressed plans to organize further demonstrations, and the County indicated that it would continue to authorize the demonstrations.

Three days after the demonstration, the Venetian filed the present action. The Venetian's complaint alleges that by granting a permit to the Unions to conduct a demonstration on the Venetian's private sidewalk, and by refusing to assist the Venetian in removing the demonstrators, the County has

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[2] The temporary pedestrian walkway has since been replaced with a permanent sidewalk.

[3] Nevada Revised Statute § 16.06 requires persons to obtain permits before putting on a special event requiring the closing of a public street or right-of-way.

taken the Venetian's property without due process in order to create a public forum. The Venetian requests a declaratory judgment that the sidewalk is not a public forum and an injunction requiring the County to recognize and enforce the Venetian's right to exclude labor union demonstrators from the sidewalk. The Unions and the ACLU of Nevada were granted leave to intervene by the district court.

On April 27, 1999, the district court denied the Venetian's request for a preliminary injunction. *See Venetian Casino Resort v. Local Joint Executive Bd.*, 45 F.Supp.2d 1027 (D.Nev.1999). The Venetian appealed this order, but subsequently withdrew the appeal and moved for summary judgment in the district court. On August 20, 1999, the court granted summary judgment against the Venetian and in favor of the County and the intervenors. This appeal followed.

II.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *See Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir.1999) (en banc); *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.1999). Our review is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(c). *See Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir.), *cert. denied*, 528 U.S. 816 (1999). "[We] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Balint*, 180 F.3dat 1050. We may affirm a grant of summary judgment on any basis the record supports, including one the district court did not reach. *See Herring v. Federal Deposit Ins. Corp.*, 82 F.3d 282, 284 (9th Cir.1995); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir.1994).

III.

DISCUSSION

The Venetian argues on appeal, as it did before the district court, that because the sidewalk along Las Vegas Boulevard in front of the Venetian is located on the Venetian's private property, it is the casino's right as a private property owner to regulate speech and expressive conduct on its property. The Unions and the ACLU of Nevada respond by arguing that the sidewalk is a traditional public forum, despite its private ownership, and that the Venetian dedicated the sidewalk to public use in exchange for approval from the County and State to construct the hotel and casino complex.[4] We affirm the judgment entered by the district court.

It is important to recognize the circumstances giving rise to the construction of the replacement sidewalk on the property of the Venetian. It was the Venetian that desired that Las Vegas Boulevard be widened to accommodate automobile traffic in front of its hotel casino. The construction of an additional lane required utilizing the property where the State maintained a public sidewalk, which was an integral part of the public sidewalk accommodating pedestrian traffic going from one hotel casino to another along the Las Vegas Strip. In order to maintain a continuous sidewalk for pedestrians to walk along that side of Las Vegas Boulevard, without walking in the street, it was obvious that the sidewalk had to continue on the Venetian's property. The introductory clauses to the agreement between the Venetian and the

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[4] The County, the original named defendant in this action, states that it is neutral regarding the public forum status of the sidewalk. The County affirms that it was the desire of the County Commissioners that the Venetian's sidewalk be identified as a public forum, but explains that because it is now before the court in its executive law enforcement capacity, it does not believe it is appropriate to promote its own opinion of what the law should be.

Department set forth the reasons for the agreement:

> Whereas, the [Venetian] is constructing a new casino resort and desires to utilize a portion of, and to access, the existing right-of-way along Las Vegas Boulevard adjacent to the [Venetian's] property in order to build an additional travel lane, modify median islands and build an approach to Las Vegas Boulevard.
>
> Whereas, DEPARTMENT is responsible for control of traffic and maintenance of Las Vegas Boulevard, a state highway, and a sidewalk currently exists on DEPARTMENT right-of-way adjacent to the highway.
>
> Now, therefore, the parties to this agreement hereby agree as follows:

Thus, it is apparent that the function of the replacement sidewalk on the Venetian's property was to be the same as the former public sidewalk in front of the Venetian and the sidewalks connecting on either side of the Venetian property. It is in this context that we interpret the first paragraph of the agreement, which states:

> 1. The [Venetian] shall construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property. The private sidewalk shall have a minimum width of ten feet and shall satisfy the Americans with Disabilities Act for the purpose of providing unobstructed pedestrian access.

It is clear that the Venetian is to provide unobstructed pedestrian access on this replacement sidewalk on the Venetian property. This was confirmed in the colloquy with the district court:

> The Court: So it's Venetian's position that the-under the '99 Agreement, the passageway or walkway has to be open for people to traverse from north to south....

Venetian: Yes, that is correct.

The Court: It-the Venetian, even though it's their property, cannot prohibit people from crossing it back and forth ...

Venetian: Right.

* * *

Venetian: "[W]hatever is incidental to pedestrian traffic, they are to facilitate. They are not to block it. They are not to impose unreasonable prohibitions."

On appeal, there was some contention that the "unobstructed pedestrian access" only referred to compliance with the Americans with Disabilities Act. This corresponds neither with the statements to the district court nor with other references in the agreement.[5]

The parties mutually agreed in Paragraph 4 that "all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, successors, and assigns as the case may be of the respective parties." It was further mutually agreed in Paragraph 5 "that this agreement shall be recorded."

Thus, there is a recorded servitude on this parcel of private property upon which the replacement sidewalk is located that the Venetian and its successors and assigns dedicate to public use to provide unobstructed pedestrian access on that sidewalk. The recorded agreement also provides in Paragraph 7 that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-

[5] Paragraph 3 refers to cleaning the sidewalk so as "to protect pedestrians and the traveling public." In Paragraph 8, the Venetian agrees to remove or modify any of the Venetian's improvements if they become a hazard or obstruction to either pedestrian or vehicular traffic. It is apparent that these provisions refer to the general pedestrian traffic that is to be afforded unobstructed access, not just those with disabilities.

of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.

The issue before us is whether the sidewalk on private property that requires unobstructed pedestrian traffic is a public forum. It is uncontested that the public sidewalk previously existing in front of the Venetian was a public forum, and it is clear that if the sidewalk on Venetian's property is removed, altered, or abandoned that the new sidewalk dedicated to the State will be a public forum. The Venetian would have us believe that the parties did not intend the replacement sidewalk on the Venetian property to be a public forum. This replacement sidewalk is a thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use. For "[t]ime out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum" *Frisby v. Schultz,* 487 U.S. 474, 480 (1988) (quotation omitted). They are the "archetype" of a traditional public forum. *Id.*

In this case, the title to the property was held by the Venetian, but by the agreement there was a servitude imposed for unobstructed public use of the sidewalk. Thus, for purposes of public use it was a public sidewalk with the normal attributes of a public sidewalk. In response to the district court's inquiry about the sidewalk, the counsel for the Venetian responded:

> Whatever is incidental to pedestrian traffic, they are to facilitate. They are not to block it. They are not to impose unreasonable prohibitions.

Free speech is certainly incidental to pedestrian traffic, for, as the Supreme Court noted, streets and sidewalks are the archetype of a public forum. *Frisby,* 487 U.S. at 480.

In *Freedom from Religion Foundation, Inc. v. City of Marshfield,* 203 F.3d 487 (7th Cir.2000), the Seventh Circuit

was called upon to determine whether a privately-owned section of an otherwise public park, containing a large statue of Jesus, was a public forum for Establishment Clause purposes. The Seventh Circuit concluded that the sale of the .15-acre section of city park to a private organization did not affect the property's status as a public forum. Factors the court deemed important were the historically public use of the park, including the now privately-owned section, the location of the private section of the park in relation to the rest of the park, and the dedication of the private section to public use. *See* 203 F.3d at 494-95.

Other courts faced with the question of whether private property qualifies as a public forum have looked to similar factors. *See, e.g., Thomason v. Jernigan,* 770 F.Supp. 1195, 1201-02 (E.D.Mich.1991) (finding privately owned cul-de-sac fronting abortion clinic to be a public forum, despite fact that city council had voted to vacate the public right-of-way the city held over the private property, because the area had traditionally been held open to the public for expressive activity and nothing distinguished the property from the other public sidewalks in the city); *Jackson v. City of Markham,* 773 F.Supp. 105, 109 (N.D.Ill.1991) (finding sidewalk and shoulder of highway, although private, to be public fora because they were located within the public highway right-of-way and were traditionally used for public speech and assembly); *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace,* 745 F.Supp. 65, 76 (D.Mass.1990) (finding Faneuil Hall Marketplace, although leased and operated by a private organization, to be a public forum, in part because the marketplace was an area traditionally used for public assembly, was dedicated to public use, and was indistinguishable from the surrounding public streets and sidewalks).

Although in this case the particular parcel of land used for the replacement sidewalk had not been a public forum

historically, the sidewalk in front of the Venetian and adjacent to Las Vegas Boulevard had been historically a public forum. It is the historical use of the sidewalk adjacent to Las Vegas Boulevard that is significant, not the piece of land on which the replacement sidewalk had to be located.

As the Seventh Circuit recognized in *Freedom from Religion Foundation,* "[w]hether a property has historically been used for public expression plays an important role in determining if the property will be considered a public forum." 203 F.3d at 494; *see also International Soc. for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992) (refusing to consider bus terminals and train terminals as traditional public fora because of their history of private ownership); *Jacobsen v. Bonine,* 123 F.3d 1272, 1274 (9th Cir.1997) (concluding that interstate rest areas are not public fora because rest areas are "modern creations" and are "hardly the kind of public property that has by long tradition ... been devoted to assembly and debate") (internal quotations and citations omitted). Here, it is uncontested that the sidewalk along the Venetian's frontage onto Las Vegas Boulevard historically has been a public forum. The sidewalk in front of the Venetian's predecessor, the Sands, was publically-owned, and we have previously held that "the public streets and sidewalks located within the Las Vegas Resort District" are public fora. *S.O.C., Inc. v. County of Clark,* 152 F.3d 1136, 1144 (9th Cir.1998). Only with the construction of the Venetian, and the concurrent widening of Las Vegas Boulevard to accommodate to Venetian's private commercial interests, was the sidewalk rerouted onto private property.

The Venetian could argue that we should disregard the sidewalk's history as a public forum if the relocation of the sidewalk onto the Venetian's property had fundamentally altered the sidewalk's character or its use by the public, *cf. Lee,* 505 U.S. at 700, 112 S.Ct. 2701 (Kennedy, J., concurring) (explaining that to change a property's public forum

status, the state "must alter the objective physical character or uses of the property"), but that has not happened here. The newly constructed sidewalk still performs the same role as a thoroughfare for pedestrian traffic along Las Vegas Boulevard that it performed before the construction of the Venetian. As the district court found, the sidewalk is used "to facilitate pedestrian traffic in daily commercial life along the Las Vegas Strip generally," and not merely to provide access to the Venetian for its patrons. 45 F.Supp.2d at 1035. Indeed, the sidewalk is the only means for pedestrians to travel north or south along the Venetian's side of Las Vegas Boulevard, a busy multi-lane traffic artery. *Cf. United States v. Kokinda,* 497 U.S. 720, 727-28, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion) (distinguishing between walkway leading from parking area to front door of post office and "thoroughfare" sidewalk running parallel to street and holding that the later, but not the former, is a traditional public forum); *Chicago Acorn v. Metropolitan Pier Exposition Authority,* 150 F.3d 695, 702 (7th Cir.1998) (holding that Chicago's Navy Pier was not a traditional public forum because "[t]he sidewalks [on the pier] are not through-routes; they only lead to the pier facilities themselves.... The pier itself is a discrete, outlying segment ... rather than a right-of-way"); *see also Citizens to End Animal Suffering,* 745 F.Supp. at 70 (finding significant the fact that "[m]any pedestrians wholly uninterested in the Marketplace's offerings cross its lanes daily in traveling to the waterfront.").[6]

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[6] The Venetian argues that cases such as *Kokinda* that address whether a sidewalk or other space is a public forum are inapplicable to this case because they all presuppose that the property at issue is government owned. However, while the sidewalk at issue in *Kokinda* was government owned, this is not true of all Supreme Court public forum cases. *See United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 132 (1981) (applying public forum analysis to privately-owned mailboxes).

There is also little to distinguish the replacement sidewalk in front of the Venetian from the connecting public sidewalks to its north and south. *See Lee,* 505 U.S. at 680, 112 S.Ct. 2701 ("separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction"). Although the paving and landscaping along the Venetian's stretch of sidewalk are somewhat different, there are no barriers or other physical boundaries to indicate to the steady stream of pedestrians making their way up and down the Las Vegas Strip that the sidewalk in front of the Venetian enjoys a different legal status than the public sidewalks to which it is seamlessly connected to the north and south: "There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalk[ ] ... that they have entered some special type of enclave." *United States v. Grace,* 461 U.S. 171, 180 (1983) (holding that sidewalk surrounding Supreme Court building is a public forum despite legislation declaring the sidewalk to be a non-public forum); *cf. Marsh v. Alabama,* 326 U.S. 501, 503 (1946) ("The town and the surrounding neighborhood ... can not be distinguished from the Gulf property by anyone not familiar with the property lines...."); *Freedom from Religion Foundation,* 203 F.3d at 494 ("[N]o visual boundaries currently exist that would inform the reasonable but knowledgeable observer that the Fund property should be distinguished from the public park."); *Gerritsen v. City of Los Angeles,* 994 F.2d 570, 576 (9th Cir.1993) ("While the Olvera Street area [of El Pueblo Park in downtown Los Angeles] may have a special ambience, it is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status."); *Citizens to End Animal Suffering,* 745 F.Supp. at 71 n. 13 ("The similarity of the Marketplace to a municipal park is underscored by the absence of any discernable boundaries between the Marketplace and the immediately-adjacent, public areas....").

The Seventh Circuit's opinion in *Freedom from Religion Foundation* places emphasis on the fact that the .15 acres containing the cross was dedicated to public use. Property that is dedicated to public use is no longer truly private. Although the owner of the property retains title, by dedicating the property to public use, the owner has given over to the State or to the public generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property," the right to exclude others. *Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979)); *see* 39 Am.Jur.2d, Highways, § 183 (1999) (public dedication creates an easement in the public "with fee title to the property remaining in abutting property owners"). The private owner can no longer claim the authority to bar people from using the property because he or she disagrees with the content of their speech. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 801 (1985) (assuming that public forums may include "private property dedicated to public use"); *see also Marsh,* 326 U.S. at 506 ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.")

The Venetian insists that it has neither dedicated the sidewalk along Las Vegas Boulevard to public use nor conveyed any property interest in the sidewalk to the County or the State. We cannot agree. We note that counsel for the Venetian conceded to the district court that the Venetian has an obligation under the 1999 Agreement not to restrict public access to and passage along the sidewalk. The 1999 Agreement requires the Venetian to "construct and maintain" a "private sidewalk connecting to the public sidewalks on either side of its property." The Agreement states that the sidewalk "shall have a width of ten feet and shall satisfy the Americans with Disabilities Act *for the purpose of providing unobstructed pedestrian access* " (emphasis added). The

agreement also requires the Venetian to remove any improvement it constructs along the sidewalk if the State determines that it is a hazard or an obstruction to pedestrian or vehicular traffic, and the Agreement specifies that if the Venetian ever removes, alters, or abandons the sidewalk, it must dedicate the necessary right-of-way to permit the construction of a replacement public sidewalk. Read together, these provisions constitute a dedication of the sidewalk to public use. They require the Venetian to provide a sidewalk for general public use, and they deprive the Venetian of its private property right to block or otherwise impede public access to the sidewalk.

Furthermore, because the 1999 Agreement specifies that it is to be recorded and that it shall bind "the heirs, ... successors and assigns" of the parties, the Agreement operates as a servitude. *See* Restatement (3d) of Property (Servitudes) § 1.3 ("A covenant is a servitude if either the benefit or the burden 'runs with the land.' "); *id.* § 2.2 ("Commonly used formulas for stating intent to create servitudes include statements that the interests created 'run with the land' or that they 'bind' or 'inure' to the benefit of 'heirs and assigns' or 'successors' of the parties."); Roger A. Cunningham et al., *The Law of Property* § 8.16 (2d ed.1993) (the use of the word "assigns" is highly persuasive of an intent to create a servitude). Whether the servitude created by the 1999 Agreement is characterized as a restrictive covenant or an affirmative easement does not matter. In either case, as a result of the 1999 Agreement, the State of Nevada possesses a property interest in a portion of the Venetian's land, the purpose of which is to guarantee unrestricted public passage along Las Vegas Boulevard. *See Meredith v. Washoe County School District,* 84 Nev. 15, 435 P.2d 750, 752 (1968) (explaining that "a restrictive covenant is an easement or a servitude in the nature of an easement"); Restatement § 2.18 ("[T]he right to control a servitude for the benefit of the public is located in the state and the right to use the servitude

benefit extends to the public at large.").

We are not persuaded by the interpretation offered by the Venetian on appeal that the 1999 Agreement merely requires the Venetian to provide a sidewalk that complies with the requirements of the Americans with Disabilities Act. The Venetian undoubtedly is required to comply with the ADA, but this requirement is only a part of the Venetian's larger obligation under the Agreement to construct and maintain a private sidewalk "for the purpose of providing unobstructed pedestrian access." The Venetian relies on the final paragraph 6 of the agreement in contending that no dedication to public use occurred. That paragraph states:

> 6. The [Venetian] retains full rights inherent to the ownership of private property to the full extend permitted by the Fifth and Fourteenth Amendment to the United States Constitution and the parties do not intend by this agreement that the DEPARTMENT is taking any state action as to the private sidewalk *other than the requirement in paragraphs 1 through 4 under "[Venetian] AGREES" above.* (emphasis added.)

The key phrase is the one emphasized, because the paragraphs 1 through 4 referred to are the portions of the agreement that provide the dedication to the public.

These paragraphs provide for the construction and maintenance of the sidewalk, connecting to public sidewalks on either side of the property, and for the Venetian to maintain and clean the sidewalk so as to "protect pedestrians and the traveling public." Thus, the Venetian retains a property interest other than that dedicated to the public by paragraphs 1 through 4. This type of dedication to the public is an advantage to the Venetian, in that it can beautify the sidewalk and select the material to cover the sidewalk so long as it does not interfere with the dedicated public use.

The mere retention of some property interest in the parcel

does not affect the public nature of the dedicated use of the sidewalk. As the Supreme Court has recognized, simply declaring an entity to be private "does not alter its characteristics so as to make it something other than what it actually is." *Lebron v. National R. Passenger Corp.*, 513 U.S. 374, 393 (1995) (holding that Amtrak is subject to the First Amendment despite provision in its charter declaring it to be private corporation) (internal quotation and citation omitted).

The historically public character of the Venetian's sidewalk, the sidewalk's continued use by the general public, the fact that the sidewalk is connected to and virtually indistinguishable from the public sidewalks to its north and south, and the dedication of the sidewalk to public use all serve to distinguish this case from the two Supreme Court cases relied upon by the Venetian: *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976). In those cases, the properties at issue-pedestrian "promenades" inside private enclosed shopping centers-were intended solely to be used to facilitate the patronage of the shopping centers' tenants. *See Lloyd*, 407 U.S. at 553 (describing walkways as "private interior promenades ... serving the stores"); *id.* at 564-65 (stating that the invitation extended to the public "is to come to the [Lloyd] Center to do business with the tenants...."). The promenades were not an integral part of "the city's automotive, pedestrian or bicyclists' transportation grid," *Chicago Acorn*, 150 F.3d at 702, and most importantly, they were never dedicated to public use. *See Lloyd*, 407 U.S. at 570 (concluding that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights"). While the mall owners in *Lloyd* and *Hudgens* were free to barricade their walkways, or close their malls outright, without giving patrons any legal ground to complain, the Venetian is not. Even if the Venetian were to close its doors or to be converted into a members-only club or some other non-

public enterprise, members of the public would still have the recorded right to pass across the Venetian's property along Las Vegas Boulevard and to express themselves as they do so with the same freedom as on any public sidewalk.

The other cases cited by the Venetian can be distinguished on the same bases. The Venetian cites *Garrison v. City of Lakeland,* 954 F.Supp. 246, 250 (M.D.Fla.1997), in which the court held that union demonstrators did not have a First Amendment right to picket on a private road leading to a hospital. Unlike the sidewalk in front of the Venetian, however, the road in *Garrison* was never "dedicated by the City as a public thoroughfare" and served only as "a local access drive maintained by [the hospital] as part of its internal circulation system." *Id.* at 250. The Venetian also cites *Rouse v. City of Aurora,* 901 F.Supp. 1533, 1537 (D.Colo.1995), in which the court held that anti-pornography protestors did not have a First Amendment right to picket on the private shopping center sidewalk in front of an adult book and video store. However, the private sidewalk in *Rouse,* like the "promenades" in *Lloyd* and *Hudgens,* was intended only to provide access to the shopping center's stores. *See id.* at 1537. There is no indication that the sidewalk was dedicated to general public use. Furthermore, the court states that in addition to the private sidewalk running in front of the stores, the shopping center was "bordered on its far perimeter by a public sidewalk." *Id.* No such alternative public sidewalk is available in front of the Venetian.

In none of the cases cited by the Venetian does the privately-owned property at issue possess all the attributes of a public forum possessed by the sidewalk in front of the Venetian. As a "thoroughfare sidewalk," seamlessly connected to public sidewalks at either end and intended for general public use, the sidewalk in front of the Venetian is "the archetype of a traditional public forum," *Frisby,* 487 at 480.

IV.

CONCLUSION

Given the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas' network of public sidewalks, and its dedication to public use under the Venetian's 1999 Agreement with the Department, we conclude that the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

ADDENDUM

AGREEMENT

THIS AGREEMENT made this 8th day of January, 1999, between VENETIAN CASINO RESORT, L.L.C., hereinafter referred to as the COMPANY, and the STATE OF NEVADA, DEPARTMENT OF TRANSPORTATION, hereinafter referred to as DEPARTMENT:

WITNESSETH:

Whereas, the COMPANY is constructing a new casino resort and desires to utilize a port of, and to access, the existing right-of-way along Las Vegas Boulevard adjacent to the COMPANY's property in order to build an additional travel lane, modify median islands and build an approach to Las Vegas Boulevard.

Whereas, DEPARTMENT is responsible for control of traffic and maintenance of Las Vegas Boulevard, a state highway, and a sidewalk currently exists on DEPARTMENT

right-of-way adjacent to the roadway.

Now, therefore, the parties to this agreement hereby agree as follows:

COMPANY AGREES:

1. The Company shall construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property. The private sidewalk shall have a minimum width of ten feet and shall satisfy the Americans with Disabilities Act for the purpose of providing unobstructed pedestrian access.

2. That the COMPANY will place no improvements in, on, or upon the DEPARTMENT's right-of-way, nor make any use of it except in accordance with the required revocable encroachment permit. (Pursuant to NRS 408.423).

3. To use vacuum type cleaners in lieu of water hoses to clean the private sidewalk during non-peak traffic hours in order to protect pedestrians and the traveling public. The area may be washed during hours of light traffic with drainage of water being provided by the COMPANY on premises, with no wash, sprinkler, or nuisance water being allowed to drain onto Las Vegas Boulevard. The sprinklers will be situated such that pedestrians and vehicular traffic are not sprayed by the operation of the sprinkler system.

4. To keep and maintain, at its sole expense, the private sidewalk free of all weeds, noxious plants, debris, and inflammable or explosive materials of every description, and at all times in an orderly, clean, safe, and sanitary condition.

5. To absolve, indemnify, and defend DEPARTMENT from any and all cost, expense, or liability arising from the construction, maintenance, or use of the private sidewalk and landscaped area, including, but not limited to drainage facilities and planter boxes.

6. The COMPANY further agrees to name the DEPARTMENT as an additional insured on its personal liability, and property damage insurance policies.

7. To dedicate necessary right-of-way to the DEPARTMENT and to construct thereon a sidewalk, with a minimum width of ten feet, behind the curb and gutter and adjacent to Las Vegas Boulevard at the COMPANY'sexpense should the private sidewalk be removed, altered, or abandoned, and to construct the sidewalk at least equal to State standards in effect at the time of the restoration. A no fee encroachment permit shall be obtained from DEPARTMENT prior to construction.

8. To remove or modify any of the COMPANY's improvements at the COMPANY's expense if they become a hazard or obstruction to either pedestrian or vehicular traffic, as reasonably determined by the DEPARTMENT.

9. To maintain all improvements at COMPANY's sole expense. All maintenance activity shall be done during periods of light pedestrian traffic.

IT IS MUTUALLY AGREED:

1. That the DEPARTMENT is not taking any private property interest with this document. The use being permitted is at the request of and for the benefit of the COMPANY and that the DEPARTMENT assumes no liability or risk resulting from said use in the manner proposed.

2. That DEPARTMENT retains the right of approval for the landscaped buffer area and new pedestrian walkway construction as contemplated herein.

3. This agreement shall constitute the entire contract between the parties hereto, and no modification hereof shall be binding unless endorsed in writing.

4. All covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, admin-

istrators, successors and assigns, as the case may be, of the respective parties.

5. That this agreement shall be recorded.

6. The COMPANY retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment to the United States Constitution and the parties do not intend by this agreement that the DEPARTMENT is taking any state action as to the private sidewalk other than the requirement in paragraphs 1 through 4 under "COMPANY AGREES" above.

IN WITNESS WHEREOF the parties hereto have executed this agreement the day and year first above written.

BRUNETTI, Senior Circuit Judge, dissenting:

To fully understand the nature of the property in dispute here, it is necessary to scrutinize more closely the history of the Venetian Casino construction and, more specifically and significantly, to compare the two agreements entered into by the Venetian, first with Clark County and then with the State of Nevada.

The undisputed facts are as follows: Venetian owns a large block of property in Las Vegas. This property has always been in private hands. In 1997, Venetian obtained approval to demolish the hotel formerly sitting on the property and to construct a new hotel. The new hotel's frontage and main entrance face LasVegas Boulevard.

In February 1997, Venetian entered into negotiations with Clark County and eventually reached a predevelopment agreement. The 1997 Agreement contemplated that Venetian would construct certain improvements to alle-

viate the new hotel's anticipated impact on traffic, and would convey property rights to the County or State if "required to construct the IMPROVEMENTS," including any "public rights-of-way" that might be "needed for [those] systems." Venetian agreed that "[a]ny conveyance of land" to "the COUNTY or to the State of Nevada, for public use of sidewalks ... will be for facilitating the perpetual flow of pedestrian traffic, utility easements, public facility easements, and for maintenance purposes of said sidewalks, walkways, and pedestrian passageways, without restrictions." To identify the specific measures that would be required to address "pedestrian safety needs as they relate to public walkways," Venetian agreed to conduct a traffic impact evaluation study for the County's approval and to abide by the Study's recommendations.

During a public hearing on the Agreement, several County Commissioners expressed concern that, under this Agreement, the public might not have free speech rights on the sidewalk in front of the Venetian. The response these concerns received was ambiguous. Despite these unresolved concerns about the reach of the First Amendment to the Venetian's property, the County decided not to table the sidewalk issue in order to obtain additional legal guidance and instead voted to approve the Agreement and continue with the traffic impact study.

The Study recommended widening Las Vegas Boulevard by one traffic lane along the Venetian frontage. The additional lane would replace an existing public sidewalk, but would also exhaust the State of Nevada right-of-way on Las Vegas Boulevard, leaving no remaining State right-of-way on which to construct a new sidewalk. Any new sidewalk therefore would have to be constructed on Venetian's private property. The final County-approved Traffic Study did not require Venetian to convey any property rights to the State (including any public right-of-way) for a new public side-

walk.

Because Las Vegas Boulevard sits on a State – not County – right-of- way, Venetian began negotiations with the Nevada Department of Transportation to address the issue of pedestrian passage along the Venetian frontage on Las Vegas Boulevard. The discussions between Venetian and NDOT produced the 1999 Agreement at issue in this case.

The language regarding the sidewalk in the 1999 Agreement stands in marked contrast to that in the 1997 Agreement. Instead of referring to "public property rights," the Agreement refers to the sidewalk as private six times. In fact, every time the sidewalk is referred to in the contract, it is designated a "private sidewalk." The agreement goes on to distinguish the "private sidewalk" from the "public sidewalks on either side of [Venetian's] property."

Furthermore, it is stated that "the Department [of Transportation] is not taking any private property interest with this document. The use being permitted is at the request of and for the benefit of the [Venetian]...." The final clause of the Agreement explicitly states: "The [Venetian] retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment to the United States Constitution."

A comparison of these two agreements speaks volumes about the nature of the property in dispute here. It is clear that the County could have (and should have) demanded a full conveyance of the sidewalk. This was in fact part of the earlier 1997 Agreement, but the County and State chose not to enforce that provision in the final agreement with the Venetian. It is significant that, even though the language in the 1997 Agreement which created a public right-of- way provoked concern over the First Amendment, the County and State went ahead and weakened the language in the 1999 Agreement even further. Both sides of this agreement were

sophisticated parties who understood the benefits of the bargain. During the course of the negotiations, the County and State chose not to hold up the building of the casino, so as to gain a public right-of-way. They made a calculated decision to change the language of the contract, and we should read the changed language as meaningful. The County and State should not be given by this court property rights that it clearly bargained away. Because I believe the majority does exactly that, I respectfully dissent.

"Before deciding whether defendant can be enjoined from prohibiting speech on its premises, the court must undertake a two-step inquiry. First, the court must determine whether this defendant, an ostensibly private party, may be held to constitutional standards when it attempts to regulate activity on its premises. If so, the court must then characterize the forum at issue, thereby setting the constitutional standards by which defendant's regulations are to be judged." *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65, 69 (D.Mass.1990) (citations omitted). At issue here is the first step of this inquiry: whether Venetian, a private corporation, may be held to the standards of the First Amendment when it regulates activity on its sidewalk.

Here, the appropriate test for determining whether a private party's actions are fairly attributable to the State is whether the "private actor has assumed a traditionally public function." *Id.* at 69 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)). The Supreme Court has cautioned that this determination of whether a private party may be subject to constitutional standards is "necessarily fact-bound." *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)). With all due respect to the majority, I believe that a comprehensive analysis of all the facts here leads to exactly the opposite conclusion that it reached: the Venetian is

merely a private actor, acting on private land.

The "relevant question" under the public function test "is not simply whether a private group is serving a public function," but rather "whether the function performed has been traditionally the *exclusive* prerogative of the State." *Rendell-Baker v. Kohn,* 457 U.S. 830, 842 (1982)(internal quotation marks omitted)(emphasis added). Here, the Venetian is regulating access to and activity on private property, including a private sidewalk, a "traditionally private function." *Tynecki v. Tufts Univ. Sch. of Dental Medicine,* 875 F.Supp. 26, 33 (D.Mass.1994). The only exception to the general rule that private parties can regulate private functions without triggering First Amendment restrictions, recognized by the Supreme Court in *Marsh v. Alabama,* 326 U.S. 501 (1946), is inapplicable here. In *Marsh,* the company town performed all municipal functions and therefore was found to be a state actor, as "the [corporate] town ... does not function differently from any other town." 326 U.S. at 508, 66 S.Ct. 276.

In *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), and *Hudgens v. NLRB,* 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), the Supreme Court considered the application of the *Marsh* exception to sidewalks within private shopping centers. The Court counseled against stretching the "public function" idea to encompass any private area open to the public and bearing a resemblance to a public space. *See Lloyd,* 407 U.S. at 570 ("[T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens must be respected and protected.") In *Lloyd,* the Supreme Court made clear that the simple fact of opening up a private space to the public and a functional similarity to "facilities customarily provided by municipalities" do not automatically subject that private property owner to the restrictions of the First Amendment. *Id.* at 569. "The argument reaches too far. The Constitution

by no means requires such an attenuated doctrine of dedication of private property to public use.... Nor does property lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* Instead, the holding of *Marsh* should be limited to the company town, an "economic anomaly of the past," or at least to situations in which a private property owner assumes the "full spectrum of municipal powers" in a manner similar to the company town. *Id.* at 561, 569.

The majority attempts to maneuver around the Supreme Court's limitation of *Marsh* and also its clear hesitation to expand the "public function" idea further. They do so by distinguishing the pedestrian "promenades" inside these private enclosed shopping centers as intended solely for access to the center itself, whereas the Venetian's sidewalk is an "integral part of the city's ... transportation grid." However, this distinction alone does not hold up under scrutiny, as it mimics the functional similarity argument rejected in *Lloyd.* The mere fact that the Venetian's sidewalk is open to the public generally and therefore performs the same function as a public sidewalk is not sufficient without more to subject the property to constitutional standards. There must be a kind of all-encompassing "assumption or exercise of municipal functions or power" comparable to that in *Marsh. Lloyd,* 407 U.S. at 569.

Therefore, the only possible distinction that can be drawn between the private sidewalks in *Lloyd* and *Hudgens* and the Venetian's sidewalk at issue here is a potential dedication of the sidewalk to public use by the Venetian. I agree with the majority that, if the Venetian had truly given the public an explicit right to its property in the 1999 Agreement, then this sidewalk would indeed fall within the ambit of the First Amendment. This is in essence a matter of contract interpretation, and I believe that close scrutiny of the circumstances that led to the contract and the plain language of the contract

itself, as well as the history of the piece of property at issue and its physical characteristics, will compel an entirely different conclusion than that arrived at by the majority.

A. Historic Use for Public Expression

The majority only acknowledges in passing the most crucial fact in determining the historical use of this property: the sidewalk was rerouted onto private property. Never before had the ground upon which the sidewalk now sits been used by the public; never before had a sidewalk been placed there. It is, was, and always has been privately-owned property. However, the former sidewalk is now replaced by a highway; it exists no more. The majority glosses over this crucial fact, stating that "[it] is the historical use of the sidewalk adjacent to Las Vegas Boulevard that is significant, not the piece of land on which the replacement sidewalk had to be located." This statement is simply wrong, as the fact that a public sidewalk existed at one time just a few feet away does not convert private property into public property. Any First Amendment analysis as to the requirement of state action must start with the piece of property at issue in the case, and this starting point can not be glossed over by importing in the history of other pieces of property.

Therefore, because this sidewalk is on property that is and always has been private, the most compelling cases which hold private property subject to First Amendment protection due to a dedication are inapplicable here. They either involve property that had previously been public or still retained an underlying public character. *See Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir.2000) (city converted a portion of a public park into private property, while reserving a covenant running with the land that restricts the use of the parcel to public purposes); *Citizens to End Animal Suffering*, 745 F.Supp. at 71 n. 10 (Faneuil Hall is owned by the City of Boston and leased to private actors with an express easement reserved to

the City). In both cases, the property in dispute had at some point been completely public and was converted into a private property interest with an interest retained by the public. Here, that is simply not the case.

Furthermore, the majority maintains that they would have been persuaded that Venetian should not be considered as a state actor, if it "fundamentally altered the sidewalk's character or its use by the public." This requirement assumes again that the property in dispute had at some point been public, which it had not. Because the sidewalk is located on property that has always been private, Venetian should not have to do something proactive to signal its private character or else risk falling within the First Amendment. By requiring this of the Venetian, the majority essentially creates a presumption that, if an individual owns private property which looks like it could be public, that person will have to let the public know that its private or else he will be acting as the State.

However, even assuming that alteration or separation of its private sidewalk from the surrounding public sidewalks is required of the Venetian, it has amply demonstrated that the sidewalk at issue is markedly different from the public sidewalks to which it connects. It was designed to fit within the design concept of the Venetian, with pavement patterns and light posts matching those of the exterior plaza area of the hotel. The sidewalk seamlessly matches the Venetian and does not match the continuation of the sidewalk on either side. Therefore, "visual boundaries currently [do] exist that would inform the reasonable but unknowledgeable observer that the [Venetian sidewalk] should be distinguished from the [public sidewalk]." *Freedom from Religion Foundation,* 203 F.3d at 494.

It bears noting that every case concerning historical use for public expression cited by the majority relates to the level of protection afforded First Amendment rights, after the state

action requirement was satisfied. *See., e.g., United States v. Kokinda,* 497 U.S. 720, 723 (1990)("The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and *lies entirely on Postal Service property.*")(emphasis added); *Int'l Society for Krishna Consciousness v. Lee,* 505 U.S. 672, 673 (1992)("In this case we consider whether an airport terminal operated by a *public authority* is a public forum ....") (emphasis added); *Chicago Acorn v. Metropolitan Pier Exposition Auth'y,* 150 F.3d 695, 702 (7th Cir.1998) (stating that "[i]f the MPEA were a private entity, it would have a free hand in deciding whom to admit to its property and on what terms.... But it is *publicly owned,* and so its owner, the MPEA, is subject to the First Amendment."). They do not address the issue we face today, whether a private actor has given the public a right to use its property, such that the First Amendment applies to that actor as if he was the State. Instead, they address whether or not a piece of publicly-owned property is a public forum.

The majority imports from this misapplied public forum analysis a distinction between non-thoroughfare and thoroughfare sidewalks which has never before been applied to private actors. *See Kokinda,* 497 U.S. at 727-28. In fact, *Kokinda* clearly states that the issue before the Supreme Court was the level of scrutiny to apply to the governmental action there, not whether the government was an actor at all: "[t]he Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that government actions are subject to a lower level of First Amendment scrutiny when the government [is] operating ... as proprietor, to manage its internal operation." *Id.* at 725 (internal quotation marks and citations omitted).

The majority dismisses this distinction in a footnote, stating that "while the sidewalk at issue in *Kokinda* was government owned, this is not true of all Supreme Court public

forum cases." *See* footnote 6. However, the majority's characterization of the issue as one of government ownership alone misconstrues the fundamental requirement for a First Amendment analysis, which is state action. The Supreme Court case cited by the majority in their footnote, *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981) clearly involved state action, as at issue was a federal statute prohibiting the deposit of unstamped mailings in letterboxes. Therefore, the First Amendment analysis turned on the Postal Service's enforcement of that statute to all letterboxes. *See id.* ("What is at issue in this case is solely the constitutionality of an Act of Congress which makes it unlawful for persons to use, without payment of a fee, a letterbox which has been designated an 'authorized depository' of the mail by the Postal Service.") Here, the issue is whether the State has acted at all, an issue clearly resolved in *Greenburgh*.

Although this distinction might appear to be an issue of semantics, it has important ramifications for the scope of the First Amendment. It is true that the inquiry as to whether or not a private party is acting as the state will often involve similar factors as the inquiry into what level of protection a piece of property receives, such as the dedication of the property by the private individual to public use. However, the reach of the First Amendment is broadened when we incorporate the public forum analysis within the state action inquiry. Our focus shifts away from whether that specific private actor is actually acting as the state (i.e. when performing a public function) to whether that type of property historically has been used as a public forum. This move broadens the scope of who is a state actor for the purposes of the First Amendment because the inquiry becomes more generalized. No longer do we have to focus on that specific actor acting on that specific property. Instead we will ask: "Is this *type* of property *generally* used for public purposes?"

Here, the impact of blurring the boundaries becomes apparent, because sidewalks are traditionally public fora. In fact, they are a classical example of the public space. However, that should only matter if they are publicly- owned or publicly-dedicated sidewalks or if the private owner is somehow assuming a public function. If we allow the public forum analysis to creep into the analysis of whether or not the public has a right to a particular piece of property, any private piece of property of a type traditionally owned and operated by the public or which is used in a manner traditionally associated with the public will presumptively satisfy the state action requirement, without any showing at all that the actual private property owners involved acted as the state. This new reading of the First Amendment's state actor requirement will greatly undermine private property rights, as the majority opinion undercuts the ability of private actors to negotiate and determine the rights that apply to their property, if that piece of property happens to be space traditionally construed as public.

B. The Language of the 1999 Agreement

In analyzing whether or not Venetian dedicated the sidewalk to the County or State, a comparison of the language in this contract and the negotiations surrounding it to the contract in *Citizens to End Animal Suffering*, in which a property right was clearly and explicitly given to the public, exposes the relatively weak argument the appellees present here. In *Citizens to End Animal Suffering*, the district court enjoined the owners of Faneuil Hall Marketplace, a private corporation, from interfering with the plaintiffs' freedom of expression, because the Hall was performing a public function. There, as stressed by the court, the "lanes on which plaintiffs wish[ed] to protest are encumbered by an easement for public access." *Citizens to End Animal Suffering*, 745 F.Supp. at 70.

That easement is markedly different from the language in

dispute in this contract. There, the property was actually owned by the City of Boston and merely leased to the owners of Faneuil Hall Marketplace, Inc. Incorporated in the language of the lease was an express easement, in which the City reserved the right of the public for pedestrian access. The language in that contract was as such: "The City hereby reserves unto itself ... a perpetual, non- exclusive easement, for the benefit of and use by the general public, for reasonable, peaceful, and orderly pedestrian access and passage." *Id.* at 71 n. 10.

In *Citizens to End Animal Suffering,* the relationship of landlord and lessee created an ongoing relationship between the City and the private individuals, and the City needed only to reserve a right that it already had in the property. In the present case, there is no such relationship; the land on which the sidewalk was erected has always been private. Therefore, the State was not merely holding on to, or reserving, a right that it previously had. It came to the contractual table with no rights in that piece of property, and the Venetian would have had to give over to the State "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994). But, in the contract with the State, the Venetian gave no dedication or easement for use by the general public as a sidewalk. If we do not demand an even higher showing of express intent in this instance, we should at least require the parties to be as explicit as they were in the reservation contained in *Citizens to End Animal Suffering.*

However, the majority does not. It reads the language "for the purpose of providing unobstructed access" in the 1999 Agreement as creating an express easement for the public. For additional support of that reading, the majority relies on a clause in the Agreement which states that, if the Venetian removes, alters, or abandons the sidewalk, it must then dedicate the necessary right-of- way to permit the con-

struction of a replacement public sidewalk. The majority also points to the recording of the agreement and the language which binds later parties, as evidence of a servitude.

There are numerous problems with this analysis. A dedication under Nevada law requires a devotion of the land for public purposes "manifested by some clear declaration of that fact." *Shearer v. City of Reno,* 36 Nev. 443, 136 P. 705, 707 (1913). This requires a "showing that [the Venetian] clearly and unequivocally intended to devote [that portion of the property] to public use." *Anderson v. Felten,* 96 Nev. 537, 612 P.2d 216, 218 (1980). The appellees here are required to demonstrate that the Venetian clearly and obviously intended to dedicate that portion of their property to the State of Nevada. This they cannot do. The majority helps them by cobbling together a dedication from various provisions in the contract, while ignoring the great weight of the contractual language demanding the opposite conclusion.

First, the overwhelming majority of the 1999 Agreement's language indicates that Venetian and the NDOT agreed that the sidewalk would be wholly private. The sidewalk is always referred to as private, and it is distinguished from the public sidewalks that connect to it. The parties' rights are clearly delineated in the agreement: the Venetian retains "full rights inherent to the ownership of private property," whereas the NDOT does "not tak[e] any private property interest."

The majority dismisses these statements as "limited by the terms and conditions set forth elsewhere in the Agreement." However, the majority's interpretation of the contract requires a reading that gives some clauses meaning while rendering the others void. Although the Venetian states that it retains full rights, the majority's interpretation reads this out of the contract. The NDOT states that it has no property interest in the sidewalk, yet the majority gives them an interest anyway. The contract as a whole becomes non-

sensical, as one clause is read to trump all the others.

Secondly, and most importantly, there is no language in this contract similar to that in *Citizens to End Animal Suffering*. Nowhere does the Venetian give an "easement" or a "dedication" for public use as a sidewalk. The only clause that could possibly be interpreted as the transfer of a property interest states in its entirety:

> [Venetian] shall construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property. The private sidewalks shall have a minimum width of ten feet and shall satisfy the Americans with Disabilities Act for the purpose of providing unobstructed pedestrian access.

The majority makes much of the fact that Venetian's counsel conceded to the district court that it could not unreasonably obstruct the flow of pedestrian traffic. However, this is creating the proverbial mountain out of a molehill. By the plain language of that clause, Venetian provides pedestrian access to its sidewalk which is unobstructed. The issue is whether or not that condition placed upon the private sidewalk is sufficient to create a dedication for the public and therefore afford First Amendment rights there. As I have discussed herein, I do not think that, under the case law, this contract language is sufficient to treat the Venetian as a government actor.

Although the majority finds this line of reasoning unpersuasive and insignificant, I read this language as merely a recitation of the Venetian's obligations under the American Disabilities Act. Under the ADA, any "private entity" operating a "public accommodation"--which encompasses virtually all types of commercial establishments, including a "hotel"--must remove all "architectural barriers" that operate to inhibit access by disabled persons. 42 U.S.C. § §

12181(7)(A), 12182(b)(2)(A)(iv). The obligation to "remove barriers" includes "[i]nstalling ramps" and "[m]aking curb cuts in sidewalks and entrances." 28 C.F.R. § 36.304(b)(1), (b)(2). With particular respect to newly constructed public accommodation, moreover, the ADA requires an "unobstructed way of pedestrian passage" to principal areas of the facility from any "exterior approach (including sidewalks, streets, and parking areas)." 28 C.F.R. § 36.403(e)(1). Therefore, this language should be read as indicative of the State's intention to treat Venetian's private sidewalk no differently than any other private sidewalk fronting a commercial establishment.

Finally, even if this language can be read as something more than compliance with the ADA, it is not a dedication of a right-of-way or an easement. Instead, as Venetian argues, it seems more akin to any restriction placed upon planned construction, such as a requirement to maintain a parking lot adjacent to the sidewalk. Venetian is required by the language of the contract to maintain a "private sidewalk." As long as it does so, Venetian retains full private property rights in that sidewalk. If it removes the private sidewalk, it must replace it with a dedicated right-of-way.

The majority relies on the clause concerning possible alteration or destruction of the current sidewalk by the Venetian and the subsequent dedication to indicate that a dedication is already in place. A straightforward reading of the contract indicates otherwise. If the State already had a dedication, then the clause would only have to indicate that, if the Venetian interfered with its dedication, it would be violating its obligations under the contract. Instead, the language states that, "should the private sidewalk be removed, altered, or abandoned," then Venetian would be obligated to "dedicate [the] necessary right-of-way to the Department." The plain language clearly indicates that a dedication does not currently exist, and it is only in the event that Venetian de-

stroys its private sidewalk that it will then have to give over a dedication.

This reading is buttressed by the lifespan of dedications under Nevada law. "According to the great weight of authority a dedication ... is irrevocable, and the dedicator is forever concluded from exercising any authority or setting up any title to the same." *Shearer*, 36 Nev. 443, 136 P. 705, 710. If this clause is a dedication and, as the majority believes, it binds the Venetian's heirs and successors under the contract, then it should be irrevocable and eternal. The Venetian would be unable to take it away, rendering the clause creating a dedication under certain circumstances (such as destruction or alteration of the private sidewalk by the Venetian) superfluous. A common- sense reading of that clause only gives the NDOT a dedication if certain events occur, and conversely, if these events do not occur, the NDOT does not have a dedication.

It is axiomatic that the First Amendment only applies to state actors and therefore that the Constitution does not provide protection or redress against abridgement of free expression by private individuals or corporations. However, the majority opinion seemingly ignores this fundamental axiom and today applies the First Amendment to a private corporation's regulation of its own private sidewalk, which was built on a portion of the property that had always been private. To arrive at this curious result, the majority relies on case law which does not address the issue of state action, but rather focuses on whether private land can be a public forum, an issue that we can only reach after finding a state actor. Furthermore, the majority misconstrues the historical nature of the property in question and relies on a misinterpretation of the 1999 Agreement and the negotiation and facts surrounding the entry into that contract. In essence, the majority collapses the past [the public sidewalk on Las Vegas Boulevard] and the future [a contractual provision requiring the Venetian

to build a dedicated sidewalk if the Venetian destroys this one] to create the present property right. In doing so, the majority has extended the First Amendment far beyond its intended reach and has undermined the rights of private property owners. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

No. CV-S-99-0276-PMPRJJ

VENETIAN CASINO RESORT, L.L.C., a Delaware Limited Liability Company,

Plaintiff,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; Culinary Workers Union, Local No. 226, an unincorporated association; Bartenders Union, Local No. 165, an unincorporated association; Clark County, a political subdivision of the State of Nevada; Stewart Bell, in his capacity as District Attorney of Clark County, Nevada; and the Las Vegas Metropolitan Police Department,

Defendants

January 4, 2000

JUDGMENT

The Court, having having entered orders granting summary judgment for the defendants and granting the request of defendants in intervention American Civil Liberties Union of Nevada and Gary Peck for declaratory relief, enters judgment as follows:

1. Plaintiff Venetian Casino Resort, LLC's claims against the Local Joint Executive Board, Culinary Workers Union, Local 226, Bartenders Union, Local 165, Clark County, Stewart L. Bell, and the Las Vegas Metropolitan Police Department are dismissed.

2. Defendants/Counter-claimants in intervention American Civil Liberties Union of Nevada's and Gary Peck's

claim for a declaratory judgment that the sidewalk on Plaintiff's property abutting Las Vegas Boulevard is a public forum is granted.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

No. CV-S-99-0276-PMPRJJ

VENETIAN CASINO RESORT, L.L.C., a Delaware Limited Liability Company,

Plaintiff,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; Culinary Workers Union, Local No. 226, an unincorporated association; Bartenders Union, Local No. 165, an unincorporated association; Clark County, a political subdivision of the State of Nevada; Stewart Bell, in his capacity as District Attorney of Clark County, Nevada; and the Las Vegas Metropolitan Police Department,

Defendants

August 20, 1999

ORDER

I. INTRODUCTION

Presently before this Court is Plaintiff Venetian Casino Resort's ("Venetian") Expedited Motion for Summary Judgment (#55) filed on July 20, 1999. Defendants Clark County, District Attorney Stewart L. Bell, and the Las Vegas Metropolitan Police Department (collectively "County") filed a Response (#58) on June 15, 1999. The American Civil Liberties Union of Nevada ("ACLUN") also filed a Response as Intervenor (#62) on June 22, 1999. On June 18, 1999, Defendants Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226 and Bartenderes Union, Local No. 165 (collectively "Unions") filed their Opposition to Plaintiff's Expedited Summary Judgment Motion

(#60) as well a Declaration of Thomas G. Snyder (#61). Plaintiff Venetian filed a Reply (#69) on July 7, 1999, and an Errata to Plaintiff's Reply (#70) on July 14, 1999.

The ACLUN brought a motion for Stay of the Plaintiff's Expedited Motion for Summary Judgment (#62) on July 19, 1999, pending the Court of Appeals ruling on Plaintiff's Appeal of the denial of Plaintiff's request for a Temporary Restraining Order and Preliminary Injunction. The Plaintiff's Appeal (#42) was filed on April 28, 1999. The ACLUN then Responded to the Opposition to the Motion to Stay (#71) on July 16. 1999.

In addition, the Defendant Unions filed an Expedited Motion for Summary Judgment (#59, #60, #61), on July 20, 1999. Defendant County filed a Response (#65) on July 6, 1999. The ACLUN filed a Response as Intervenor (#66) on July 6, 1999. Plaintiff Venetian filed an Opposition (#69) on July 7, 1999 and an Errata to Plaintiff's Opposition (#70) on July 14, 1999. Defendant Unions filed a Reply (#72) on July 19, 1999.

II. Factual Background

On April 2, 1999 Plaintiff Venetian filed a Motion for a Temporary Restraining Order and Preliminary Injunction (#9). By its Motion, the Venetian sought two forms of preliminary injunctive relief. First, it sought to enjoin Defendants Clark County and LVMPD from "awarding permits or from otherwise authorizing or allowing any persons or organizations to conduct expressive activities on Venetian's private property or to interfere with Venetian's property rights." Second, Venetian sought to enjoin Clark County and LVMPD from "refusing to recognize, protect or enforce Venetian's property rights based on the erroneous belief that Venetian may not lawfully exclude disruptive, expressive activity or any other unauthorized activity from its private property including its walkway." On April 27, 1999, this

Court denied the Venetian's Motion for a Temporary Restraining Order and Request for a Preliminary Injunction (#41), concluding that the sidewalk in front of the Venetian Casino performs an essential public function and that the Venetian may not exclude individuals from the sidewalk based upon their First Amendment rights of expression and speech.

The Court finds it unnecessary to repeat the extensive factual recitation contained in its Order (#41) entered April 27, 1999, and simply incorporates it by reference herein.

III. THIS COURT MAY PROPERLY DECIDE MOTIONS FOR SUMMARY JUDGMENT DURING AN INTERLOCUTORY APPEAL

The Court finds that the ACLUN's Motion to Stay (#62) should be denied. The pending appeal in the Ninth Circuit Court of Appeals of this Court's Order (#41) does not divest this Court of the authority or the responsibility to proceed to consider the pending Motion for Summary Judgment. *See Plotkin v. Pac. Tel. and Tel. Co.*, 688 F. 2d 1291, 1293 (9th Cir. 1982) and *Phelan v. Taitano*, 233 F. 2d 177, 199 (9th Cir. 1956).

IV. THE LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Id.*

The Supreme Court delineated Rule 56 in their 1986 "trilogy." *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986);

Anderson v. Liberty Lobby, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986). According to the Court, the movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

For almost fifty years the Federal Rules of Civil Procedure have authorized motions for summary judgment "upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp.*, 477 U.S. at 327. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* (quoting Fed. R. Civ. P. 1).

IV. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REMAINING IN THIS CASE

There are two distinct issues in this case. The first issue is what rights the Venetian has over the sidewalk directly in front of the casino. The second issue, is whether the Venetian may properly restrict the First Amendment rights of those citizens utilizing the sidewalk.

Sidewalks have long been recognized as a public forum giving citizens a right of access for First Amendment purposes. This Court ruled in its Order (#41) that, ". . .by owning and maintaining the particular sidewalk at issue in this case, the Venetian is performing a public function." Therefore, the Venetian does not have the right to exclude individuals from the sidewalk based upon, ". . .permissible exercises of their right to expression under the First Amendment. . . ."

The issues in this case have thus been resolved by this Court's Order (#41) on April 27, 1999 as a matter of law and

no material issues of disputed fact remain. Indeed, both the Plaintiff Venetian and the Defendant Unions agree that there are no issues of disputed material fact remaining and that Summary Judgment is proper in this case.

The Venetian argues that it should be granted summary judgment because the *Marsh v. Alabama*, 326 U.S. 501 (1946), exception does not apply in this particular context. The Venetian argues that for the sidewalk to fall under the public function exception outline in *Marsh*, the private property must be the functional equivalent of a municipality. The Venetian also argues that the *Marsh* exception is inapplicable where the private property does not constitute an exclusive public function. Finally, the Venetian argues that the fact that the sidewalk was used publicly prior to its becoming private property is not determinative of whether it falls under the *Marsh v. Alabama* exception.

The holding in *Marsh* does not require that the private property in question function as a complete municipality nor does it require that the Venetian be the only and exclusive provider of sidewalks in the City of Las Vegas. *Marsh* implicated not only a complete company town but also particular pieces of property which benefit the public. "Thus the owners of privately held bridges, ferries, turnpikes, and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public. . . ." 326 U.S. at 506.

V. CONCLUSION

The Court finds that it retains jurisdiction to decide the pending Motion for Summary Judgment. The Court further finds that the Order denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (#41) entered April 24, 1999, has effectively adjudicated the issues raised in this case and that no genuine issues of material fact remain.

IT IS THEREFORE ORDERED that Intervenor American Civil Liberties Union of Nevada's Motion for a Stay Pending the Court of Appeals ruling on Plaintiff's Appeal and its request for a thirty day extension with which to file an Opposition (#62) are DENIED.

IT IS FURTHER ORDERED that Plaintiff Venetian Casino Resort's Expedited Motion for Summary Judgment (#55) is DENIED.

IT IS FURTHER ORDERED that Defendant Union's Expedited Motion for Summary Judgment (#59) is hereby GRANTED.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

No. CV-S-99-00276-PMPRJJ

VENETIAN CASINO RESORT, L.L.C., a Delaware limited liability company,

Plaintiff,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; Culinary Workers Union, Local No. 226, an unincorporated association; Bartenders Union, Local No. 165, an unincorporated association; Clark County, a political subdivision of the State of Nevada; Stewart Bell, in his capacity as District Attorney of Clark County, Nevada; and the Las Vegas Metropolitan Police Department,

Defendants

April 27, 1999

ORDER

PRO, District Judge.

This case calls upon the Court to consider whether a pedestrian walkway, located on private property parallel and adjacent to the Las Vegas Strip and connected at both ends to public sidewalks, is a public forum for First Amendment purposes.

The Venetian Casino Resort ("Venetian") is a large hotel and casino currently under construction at the southeast corner of Las Vegas Boulevard and Sands Avenue. A temporary pedestrian walkway that is soon to become a permanent sidewalk runs along the frontage of the Venetian property bordering the Las Vegas Strip. This walkway is the only

thoroughfare for pedestrians walking on the east side of the Strip and connects to public sidewalks at the north and south ends of the Venetian property. On March 1, 1999, Defendants Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226, and Bartenders Union, Local No. 165 (collectively "Unions") staged a demonstration rally including picketing on the temporary pedestrian walkway to protest the Venetian's employment practices. Although the Venetian requested that the Las Vegas Metropolitan Police Department arrest the protestors for trespassing on private property, the Clark County District Attorney advised the Las Vegas Metropolitan Police Department ("LVMPD") not to do so under the sensible theory that because the pedestrian walkway looked and functioned like a public sidewalk, those peacefully protesting had a cognizable First Amendment defense to any charge of trespass.

The current dispute concerns whether the Unions, or others, have a right to exercise their First Amendment rights to free expression, subject to reasonable and content neutral time, place and manner restrictions, on the Venetian's pedestrian walkway to the same extent they could do so on a public sidewalk.

Presently before the Court is Plaintiff Venetian Casino Resort's Motion for Temporary Restraining Order and Preliminary Injunction (# 9) filed on April 2, 1999. Defendants Clark County, District Attorney Stewart L. Bell, and Las Vegas Metropolitan Police Department (collectively "County") filed a Response (# 23) on April 12, 1999. The Defendant Unions filed an Opposition (# 27) on April 12, 1999. On April 19, 1999, the Venetian filed a Reply (# 36). The Court held a hearing on the Venetian's Motion for Temporary Restraining Order and Preliminary Injunction on April 21, 1999.

I. Factual Background

The Venetian is located at the former site of the Sands Casino. As part of a plan to demolish the Sands and build the Venetian, the owners of the Sands entered into a pre-development agreement with Clark County on February 18, 1997 ("1997 Agreement"). (Sands Resort Hotel & Casino Agreement, attached as Ex. 1 to Pl.'s Mot. T.R.O./Prelim. Inj.) Part of the 1997 Agreement related to the construction of various improvements including improvements along the Venetian's frontages on Las Vegas Boulevard South, commonly referred to as the "Las Vegas Strip," and any improvements recommended by a traffic impact study. (1997 Agreement, *supra,* at § 1.2(i).) The 1997 Agreement also contains the following provision where the developer agrees to turn over proposed public property rights:

"DEVELOPER agrees to convey all proposed public property rights owned by the DEVELOPER to the COUNTY or the State of Nevada Department of Transportation, at no cost or expense, free and clear of all liens, covenants, restrictions and encumbrances, as required for construction, maintenance or use of the IMPROVEMENTS.... Any conveyance of land by the DEVELOPER to the COUNTY or the State of Nevada, for public use of sidewalks, walkways or other forms of pedestrian passage through the DEVELOPMENT, will be for facilitating the perpetual flow of pedestrian traffic ... without restrictions."

(1997 Agreement, *supra,* at § 2.2.)

The County approved the 1997 Agreement following a hearing that included the participation of the Unions. During the hearing, several County Commissioners expressed concern that the public might not have free speech rights on the sidewalk in front of the Venetian. (Transcript of The Board of County Commissioners' Meeting, attached as Ex. 1 to Unions' Opp'n, at pp. 37-39 [hereinafter Hearing].) This

concern apparently stemmed from a previous experience when the police arrested Union members for protesting on a private sidewalk next to the MGM Grand Hotel. (Hearing, *supra,* at 42-43.) The response these concerns received at the hearing is not clear. Early in the Hearing, Mark Figgens, a Deputy District Attorney, told the Commissioners that the 1997 Agreement specified that the sidewalks were for public purposes and preserved full rights for the public. (Hearing, *supra,* at 5-6.) Later in the hearing, Figgens' response to the free speech issue is less clear. Figgens advised that a transfer of property would have to be in conformance with the law and that he could not be sure how a court would interpret the language of the 1997 Agreement. (Hearing, *supra,* at p. 38.)

Following the acceptance of the Agreement, Venetian completed the required traffic impact study. (1997 Agreement at § 2.3(a).) The study concluded that traffic would best be accommodated by widening Las Vegas Boulevard and adding another northbound lane. The solution, however, would use up the government's existing right-of-way, leaving no public sidewalk.

Since the public land at issue belonged to the State of Nevada, rather than the County, the Venetian negotiated with the State of Nevada Department of Transportation ("NDOT") to come up with a solution to the problem. The Venetian claims that the County represented that the County would accept whatever agreement was reached, but the Unions claim there is no support for this proposition.[1] Regardless, the negotiations culminated in a January 8, 1999 Agreement between the Venetian and the NDOT ("1999 Agreement"). (Agreement, attached as Ex. 2 to Pl.'s Mot. T.R.O./Prelim. Inj.) In the 1999 Agreement, the Venetian

[1] The County's Response appears to lend some support for the Venetian's claim that the County agreed to go along with the decision of the NDOT because the County states it deferred to the NDOT on the issue of the sidewalk. (County's Resp. at p. 3.)

promised to construct a private sidewalk in front of its property for pedestrian access. The 1999 Agreement stated that the Venetian retained "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution." (1999 Agreement, *supra,* at Mutual Agreements § 6.) The 1999 Agreement also asserted that the NDOT was not taking any state action as to the new sidewalk.

In February 1999, the Venetian demolished the public sidewalk and set up a temporary pedestrian walkway. Later that month, the Unions applied to the County for a permit to hold a demonstration in front of the Venetian pursuant to Nev.Rev.Stat. § 16.06 (1991).[2] On February 26, 1999, the County gave the Unions a permit to hold a rally and to engage in picketing on the sidewalk in front of the Venetian.

When the Venetian learned that the Unions planned a rally, it hired a surveyor to mark its property lines and it erected signs stating that the pedestrian walkway was private property. The Unions' rally took place on March 1, 1999, from 4:30 p.m. until 6:30 p.m., and was attended by approximately 1,300 members. During the rally, the Venetian issued warnings that the demonstrators were on private property. The Union members did not leave the property, and the LVMPD, after consulting with the District Attorney, declined to make arrests or issue citations for trespassing.

After the rally, the Unions indicated that they planned to hold another and larger demonstration following the Venetian's opening. The County also indicated that it would issue another permit to the Unions upon its request. The Venetian filed this action three days after the March 1 Unions' rally alleging that the County Defendants have taken Ve-

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[2] Nev.Rev.Stat. § 16.06 requires persons to obtain permits before putting on a special event requiring the closing of a public street or right-of-way.

netian's property without due process to create a public forum, and seeking a declaratory judgment under 28 U.S.C. § 2201 that the Defendant's actions constitute an impermissible deprivation of private property rights without due process and that the privately owned and maintained pedestrian walkway is not a public forum for First Amendment activity.

By its Motion for Temporary Retraining Order and Preliminary Injunction (# 9), Venetian seeks two forms of preliminary injunctive relief. First, it seeks to enjoin Defendants Clark County and LVMPD from "awarding permits or from otherwise authorizing or allowing any persons or organizations to conduct expressive activities on Venetian's private property or to interfere with Venetian's property rights." Second, Venetian seeks to enjoin Clark County and LVMPD from "refusing to recognize, protect or enforce Venetian's property rights based on the erroneous belief that Venetian may not lawfully exclude disruptive, expressive activity or any other unauthorized activity from its private property including its walkway."

II. Preliminary Injunction

The Venetian seeks both prohibitory and mandatory injunctive relief. As a result, somewhat separate standards apply. *See Stanley v. University of Southern California,* 13 F.3d 1313, 1319-20 (9th Cir.1994).

The legal standard generally applicable to a request for prohibitory preliminary injunctive relief is well settled. The party requesting such relief must show: (1) probable success on the merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief. *See Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1528 (9th Cir.1993). These are not two separate tests, but "merely extremes of a single continuum." *Id.* (citation omitted).

When, however, a party seeks injunctive relief that goes beyond preservation of the status quo, and has the effect of requiring affirmative action by the party enjoined, the relief requested is characterized as a mandatory injunction. *See Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir.1993). Mandatory injunctions are disfavored, and therefore, the district court should not issue the mandatory preliminary injunction "unless the facts and law clearly favor the moving party." *Id.* (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1979)). *See also Hilton Hotels Corp. v. ITT Corp.*, 962 F.Supp. 1309, 1310 (D.Nev.1997).

The prohibitory injunctive relief requested by Venetian's Motion is rendered moot by the County's response that it will no longer issue permits to the Unions to hold a rally on the sidewalk in front of the Venetian. (County's Resp. at p. 3.)

The mandatory injunctive relief requested by Venetian, however, would require that County Defendants to take the affirmative steps of warning, citing, or arresting those who engage in First Amendment expressive activity to which the Venetian objects.[3]

III. Discussion

The Venetian claims that it will succeed on the merits of its takings and due process claims. It also argues that it has proved irreparable harm because it has shown a constitu-

[3] At oral argument, counsel for the Venetian was questioned by the Court as to whether all forms of expressive activity under the First Amendment would be deemed objectionable by the Venetian. Counsel responded that "incidental First Amendment expression" such an individuals wearing shirts with political messages while traversing the Venetian pedestrian walkway between the north and south public sidewalks would not be deemed objectionable by Venetian. Given the Court's ruling on Venetian's motion for injunctive relief, the Court finds it unnecessary to attempt to decipher precisely what the Venetian would deem to be "incidental First Amendment expression" versus "objectionable First Amendment expression."

tional violation and because the Unions actions will irreparably injure its goodwill. The Defendant Unions respond that the Venetian fails to state a federal claim. Alternatively, the Unions claim that they have a right to enter the Venetian's property either through agreement or by operation of law. The Unions also maintain that Venetian's injuries, if they exist, can be compensated with money, and thus do not qualify as irreparable harm. The County Defendants respond that they take a neutral position and will abide by the Court's decision on the matter. Since this Court finds that the Venetian has not clearly demonstrated it will succeed on the merits, the Court does not find it necessary to address the Venetian's arguments concerning irreparable harm.

A. Failure to State a Federal Claim

The Unions rely on *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), for the proposition that when "a state refuses to allow a commercial business to suppress free speech activity on its private property, the state does *not* violate the owner's federal rights under the First, Fifth or Fourteenth Amendments." (Unions' Opp'n at p. 9.) The Unions reason that by not arresting the protestors, the County is refusing to allow the Venetian to suppress speech. The Unions claim this can not be a taking or due process violation under *PruneYard,* and the Venetian must file suit in state court to determine if the County's actions were appropriate under Nevada law.

The Unions read *PruneYard Shopping Center* too broadly. The Court did not say that a state's interference with private property rights could never amount to a constitutional taking. Instead, the Court found that the California Constitution validly gave California citizens the right to free speech in privately owned shopping centers. *Id.* at 78-82. It then found that the California law was not a constitutional taking because it did not impair the value of PruneYard nor did it interfere with the owner's investment backed expecta-

tions. *Id.* at 83.

Even assuming that the sidewalk in this case is private property and that Nevada allows Unions to picket on private property, this Court could not automatically say that no taking had occurred. The Court would have to go through the takings analysis because deciding whether a state act is a constitutionally taking is "essentially [an] ad hoc, factual inquir[y]." *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Moreover, the Court's finding in *PruneYard Shopping Center* that the PruneYard owner had not been deprived of property without due process of law is not applicable to this case. 447 U.S. at 84-85. *PruneYard Shopping Center* discussed substantive due process, while the Venetian claims that the County violated its right to procedural due process. Thus the Court must reject the Unions' argument that under *PruneYard Shopping Center,* Venetian fails to state a federal claim.

B. Taking

The Fifth Amendment to the Constitution provides that private property shall not be taken "for public use without just compensation." U.S. Const. amend. V. A threshold issue in a takings analysis concerns the nature of the property right at issue. *See, e.g., Phillips v. Washington Legal Foundation,* 524 U.S. 156 (1998) (making the threshold determination that interest earned on client trust accounts is the private property of the client). If a private property right is being invaded, a court must then determine if the invasion amounts to a constitutional taking.

A constitutional taking occurs when it is unfair to make an individual bear the burden of an invasion that benefits the public. *See Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998) (citing *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). This is a fact intensive analysis. *See Kaiser Aetna v. United States,* 444

U.S. 164, 175 (1979). To decide if a regulation is a constitutional taking, courts often examine the following three factors: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* In contrast, the Supreme Court has found that a permanent physical invasion constitutes a taking regardless of any public interest it serves. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

The Venetian argues that by refusing to arrest the Union members when they protest on the sidewalk, the County is depriving it of its property right to exclude. *See Kaiser Aetna,* 444 U.S. at 179-80, 100 S.Ct. 383. The Unions respond that the County is not depriving the Venetian of this right because the Venetian gave up the right to exclude others in the 1997 Agreement. Alternatively, the Unions argue the Venetian does not have a right to exclude the protestors because the sidewalk is a public forum under the First Amendment.

1. 1997 Agreement

The Unions argue that the Venetian gave the public unrestricted access over the sidewalk in the 1997 Agreement with the County. (1997 Agreement, *supra,* at § 2.2.) At the hearing conducted April 21, 1999, the Unions claimed that the 1997 Agreement requires the Venetian to convey all property rights associated with the sidewalk to the County before the Venetian can obtain a certificate of occupancy. The Unions reason that the 1999 Agreement, which states that the sidewalk is private, is an invalid attempt to change the character of the rights the Venetian dedicated to the people in the 1997 Agreement.

The Court agrees that the proposed property rights contemplated by Paragraph 2.2 of the 1997 Agreement could have included the rights to the sidewalk in front of the Ve-

netian. Paragraph 2.2 states that the Venetian must turn over the proposed property rights to the needed improvements within the development. The definition of improvements includes those needed along the frontage of the Venetian parallel to Las Vegas Boulevard South as a result of the traffic impact study. (1997 Agreement, *supra,* at § 1.2(i).) However, there is no indication that the County actually proposed that the Venetian convey the rights to the sidewalk. The Court finds it unlikely that the County could now seek conveyance of the property rights without cost as contemplated by the 1997 Agreement because the Venetian agreed to pay for and maintain the sidewalk in the 1999 Agreement. (1997 Agreement, *supra,* at § 2.2, 1999 Agreement, *supra,* at Company Agreements § 1.) Since the County never asked for the property rights to the sidewalk, the 1997 Agreement provides no support for the Unions argument that the Venetian waived its right to exclude. The 1999 Agreement providing that the sidewalk is the private property of the Venetian controls.

2. First Amendment

The Unions maintain that, even if the Venetian owns the sidewalk, the Union members and other citizens have access to the sidewalk for free speech purposes in accord with the First Amendment to the United States Constitution.[4] The

[4] Although the Unions do not raise it as a defense, the Venetian claims that Nevada law does not provide any greater protection for free speech rights on private property than does the United States Constitution. The Venetian bases this contention on the fact that Nev.Rev.Stat. § 614.160(1)(a) (1997) states that unions can not picket on private property and on the fact that a Nevada state district court has previously issued an injunction prohibiting solicitation on a sidewalk owned by the Mirage because it is private property, *The Mirage Casino- Hotel v. International Missing Childrens Bulletin, Inc.*, No. A340053 (Nev. 8th Jud. Dist. Dec. 22, 1995). These sources are not particularly persuasive as the Nevada statute has not been construed by the Nevada Supreme Court and basis of the decision in the *Mirage* case is unclear.

parties agree that the previous sidewalk bordering the Sands Hotel was a public forum and if the current sidewalk was owned by the government, it would also be a public forum available to citizens for expression under the First Amendment subject to content neutral and reasonable time, place and manner restrictions.

Sidewalks have traditionally been recognized as the quintessential public forum. *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988). However, courts have not automatically found that a sidewalk is a public forum just because it is owned by the public. When deciding if a publicly owned sidewalk is a public forum, courts often distinguish sidewalks and walkways that are incidental to government property at issue from sidewalks and walkways that are generally used by the public as a thoroughfare. For example, in *United States v. Kokinda*, 497 U.S. 720, 722-23 (1990), the Supreme Court was called upon to determine whether a sidewalk that was adjacent to a post office and separated the post office from the parking lot was a public forum. The Court found that the sidewalk at issue was not a public forum because it was not a public passageway. *Id.* at 727. The Court also distinguished the sidewalk because it was only used as a destination walkway by those visiting the post office as opposed to a sidewalk used to "facilitate the daily commerce and life of the neighborhood or city." *Id.* at 728.

The Nevada Constitution clause protecting free speech, Nev.Const.Art. 1 § 9, contains almost the same language as that found to provide greater freedom of expression by the California Supreme Court, in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341, 347 (1979). However, other courts have examined similar language and have found that it does not provide access to private property. *See, e.g., Eastwood Mall v. Slanco*, 68 Ohio St.3d 221, 626 N.E.2d 59, 61 (1994). *See also* Harriet Dinegar Milks, Annotation, *Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity*, 52 A.L.R.5th 195 (1998).

The pedestrian walkway at issue in front of the Venetian is not simply a sidewalk used for ingress and egress to the Venetian, nor is it a specific destination in and of itself. The sidewalk in front of the Venetian may look different from the adjoining public sidewalks to the north and south, but it has fundamentally the same function. It allows the public to traverse from one point on a public sidewalk to another. It is used to facilitate pedestrian traffic in daily commercial life along the Las Vegas Strip generally, as well as for access to the Venetian. The question remains whether the Venetian's private ownership of the property on which the sidewalk is located entitles the Venetian to regulate the free expression of those who use it.

The general rule is that the Constitution does not apply to private conduct. *See Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976). There are very limited exceptions to this time honored principle. One occurs in the rare instance where a private actor is performing a function that has traditionally been exclusively performed by the state. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 156-59. For example, in *Marsh v. Alabama*, 326 U.S. 501 (1946), a private company owned an entire town performing all of the usual municipal functions and owning all the buildings and sidewalks. *Id.* at 502-03. The Court found that the Constitution applied to the activity in the company owned town. *Id.* at 508.

The Venetian argues that *Marsh* has since been limited to its facts. As support, the Venetian cites a statement made by the Supreme Court in *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219 (1972), and repeated in *Hudgens*. In *Lloyd Corp.*, the Court was deciding whether a privately owned shopping center should be subject to the requirements of the First Amendment. *Id.* at 552-53. The parties seeking free speech rights argued that the shopping center was the functional equivalent of a central business district. *Id.* at 568-59. The Court distinguished the shopping center from *Marsh* by

noting that the shopping center did not perform all of the municipal functions and concluded that the First Amendment did not apply. *Id.* at 569.

The Venetian disregards two important aspects of *Marsh*. First, in *Marsh,* the Court was distinguishing the argument that a shopping center was like a "company town." Second, subsequent Supreme Court cases have suggested that *Marsh* is not limited to its facts. *See Flagg Bros.*, 436 U.S. at 158.

Of course, circumstances which give rise to cases such as *Marsh* are very rare. Private property rights are very important and should not be disregarded simply because a private owner performs a function that is sometimes performed by the government. Nevertheless, if ever there was a case where the protections of the First Amendment to the United States Constitution should be applied to private property used for a particular public function, this is the case. Thoroughfare sidewalks parallel to the main public street in a city, that allow citizens to move from one part of the city to the next, have traditionally been exclusively owned and maintained by the government. Consequently, by owning and maintaining the particular sidewalk at issue in this case, the Venetian is performing a public function.

The distinction between the functions performed by a sidewalk and a shopping center was clearly drawn by the court in *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65, 70-72 (D.Mass.1990). Faneuil Hall Marketplace is a commercial development with three buildings housing various commercial enterprises and with cobblestone lanes separating the buildings. *Id.* at 67 n. 1. The land is owned by the City of Boston, but is leased to Faneuil Hall under a ninety-nine year lease. *Id.* at 68 n. 1. The court considered the property to be private during its public function analysis. *Id.* at 69, 70-72. The Court found that the private owner was performing a private function by operating the lanes in the marketplace.

Id. The Court noted that the public had a right of access to the lanes, and often used them as passages in daily traveling. *Id.* at 70. By prohibiting protestors, the Court found that the owner was performing a public police function and a legislative function. *Id.* at 71- 72. The Venetian is performing similar public functions with respect to the sidewalk abutting Las Vegas Boulevard South.[5]

IV. Conclusion

The sidewalk in front of the Venetian was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment. Since the sidewalk performs an essential public function, the Venetian does not have the right to exclude individuals from the sidewalk based upon permissible exercises of their right to expression under the First Amendment, and the County has not taken the Venetian's private property rights by failing to arrest or cite individuals who do so. The public may use the Venetian's sidewalk for First Amendment purposes to the same degree that it may use any other public sidewalk subject to content neutral and reasonable time, place, and manner restrictions.

IT IS THEREFORE ORDERED that Plaintiff Venetian Casino Resort's Motion for Temporary Restraining Order and Preliminary Injunction (# 9) is DENIED.

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[5] The circumstances presented here, as well as those present in *Faneuil Hall Marketplace,* are clearly distinguishable from those presented in two cases relied upon by Venetian, where the thoroughfares in question were private access roads to a hospital and an amusement park and where limitations on expression under the First Amendment were upheld. *See Garrison v. City of Lakeland,* 954 F.Supp. 246, (M.D.Fla.1997), and *International Soc'y for Krishna Consciousness, Inc. v. Reber,* 454 F.Supp. 1385 (C.D.Cal.1978).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 00-15136

D.C. No. CV-99-00276-PMP

VENETIAN CASINO RESORT, L.L.C., a Delaware Limited Liability Company,

Plaintiff-Appellant,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS; Culinary Workers Union, Local No. 226, an Unincorporated Association; Bartenders Union, Local No. 165, an Unincorporated Association; Clark County, a Political Subdivision of the State of Nevada; Stewart L. Bell, in his capacity as District Attorney of Clark County, Nevada; Las Vegas Metropolitan Police Department,

Defendants-Appellees

American Civil Liberties Union,

Intervenor-Appellee

August 23, 2001

ORDER

Before: SCHROEDER, Chief Judge, HUG and BRUNETTI, Circuit Judges.

Chief Judge Schroeder and Judge Hug have voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judge Brunetti has voted to grant the petition for rehearing and recommends granting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for re-

hearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and suggestion for rehearing en banc are denied.

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-918

IN THE
Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENT LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Once a property owner has given up a permanent right-of-way for municipal sidewalk traffic, does it suffer a Fifth Amendment Takings when pedestrians exercise free speech rights on the thoroughfare?

CORPORATE DISCLOSURE STATEMENT

Respondent Local Joint Executive Board of Las Vegas is a committee of two local labor unions, Culinary Workers Union Local 226 and Bartenders Union Local 165. Local 226 and Local 165 are affiliated with the Hotel Employees & Restaurant Employees International Union and the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). The Unions have not issued shares, bonds or other securities.

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STATEMENT OF THE CASE

Respondent Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 and Bartenders Union Local 165, AFL-CIO (collectively, "the Union") incorporates the Ninth Circuit's statement of the case. App. 2a-4a.

Under Sup. Ct. Rule 15.1, we address the following misstatements in Venetian Casino Resort, LLC's ("the Venetian's") petition:

A. The Venetian Does Not Have Fee-Simple Ownership of the Sidewalk.

The Venetian describes the sidewalk simply as its "private property," as though it were not burdened by any public servitude. Petition at 4. The Venetian asserts as fact that its 1999 Agreement with the State did not dedicate any right-of-way to the public. *Id.*

This is not a record fact. This is a contention that the Ninth Circuit correctly rejected. App. 14a-17a.

1. The public's right of passage is a recorded encumbrance on the Venetian's title.

The sidewalk along Las Vegas Boulevard ("the Strip sidewalk") is subject to a permanent right of public passage. App. 8a, 14a-17a. The Agreement committing it to "unobstructed pedestrian access" is recorded against the Venetian's title. App. 15a, 22a, ¶5.

This public right runs with the land. The Agreement is binding in perpetuity on the Venetian's "heirs . . . successors, and assigns." App. 21a-22a. The public's right to use the sidewalk is permanent, no matter how the Venetian uses the rest of its property. App. 14a-17a. "Even if the Venetian were to close its doors . . . the public would still have the recorded right to pass along Las Vegas Boulevard . . ." App. 17a-18a.

2. The Venetian admitted below that it has given up its power to exclude outsiders from the sidewalk.

The Venetian now tells the Court that it did not compromise any private property right in the 1999 Agreement. Petition at 4-5. In particular, the Venetian claims it did not dedicate the sidewalk to public use. Petition at 24.

The Venetian's claim contradicts its admissions below, as the Ninth Circuit noted. App. 7a-9a. At hearing on the Venetian's motion for preliminary injunction, Venetian counsel conceded:

THE COURT: — So it's the Venetian's position that the — under the '99 agreement, the passageway or walkway has to be open for people to traverse from north to south. If — the Venetian —

[Venetian Counsel]
MR. DELLINGER: Yes, that is correct.

THE COURT: Even though it's their property, cannot prohibit people from crossing it back and forth. If simply if they choose or wish to exercise some form of — assert some kind of expression, carry their sign from the public —

MR. DELLINGER: Right.

THE COURT: — across the —

MR. DELLINGER: Right, right.

THE COURT: — area to the other public side they can't do that?

MR. DELLINGER: Right, exactly.

Union Supplemental Excerpts of Record in 9th Circuit ("9th Cir. SER") at 155: 12- 156: 1. In further colloquy, Venetian counsel reiterated this concession:

> THE COURT: [U]nder your theory, why couldn't the Venetian say . . . we have to grant access to go from north to south, they can cross our property, but by God, we're not going to let them wear T-shirts that we find offensive. . . What limits — are there any limits on what the Venetian could prohibit?
>
> MR. DELLINGER: Yes, I think the limits are, and the — and the Venetian is certainly aware of these, that it is allow pedestrian traffic. And that is, whatever is incidental to pedestrian traffic, they are to facilitate, they are not to block it. They're not to impose unreasonable prohibitions . . .
>
> THE COURT: Where does — where does the Venetian draw that in other words?
>
> MR. DELLINGER: I think you are — you are quite sharp in noting that the '99 agreement never says explicitly that pedestrian passage shall be allowed, but, you know, we are willing to concede that is implicit.

9th Cir. SER 159: 22- 160: 23. Venetian counsel later summarized:

> I feel comfortable in saying, that when you open up with Paragraph 1 which says that the company shall construct and maintain . . . a private sidewalk, and

> that the private sidewalk shall satisfy the ADA for purposes of providing unobstructed pedestrian access. . . it's not expressly stated, but it's inferred that pedestrians will have the right to pass by there.

9th Cir. SER 162: 14-21.

In subsequent briefing on cross-motions for summary judgment, the parties disputed whether the 1997 or 1999 Agreements was controlling, but the Venetian continued to admit that it was bound to allow pedestrian access: "The Venetian's consistent position throughout — including during the preliminary injunction hearing — has been that the *1999* agreement appears to contemplate that the Venetian would duly keep the walkway open for pedestrian access." 9th Cir. SER 201 n.9 (italics in original).

B. The Sidewalk Is Part of the Municipal Thoroughfare System.

The Venetian creates a misleading impression when it speaks of a "private sidewalk," as if it were only an internal walkway for the Venetian's patrons. It is not. It is a connecting part of Las Vegas' thoroughfare grid, in one of the busiest urban districts in America.

The record contains a videotape of the sidewalk, SER 213. As the Ninth Circuit described it,

> the sidewalk is the only means for pedestrians to travel north or south along the Venetian's side of Las Vegas Boulevard, a busy multi-lane artery . . . [T]here are no barriers or other physical boundaries to indicate to the steady stream of pedestrians making their way up and down the Las Vegas Strip that the sidewalk in front of the Venetian enjoys a different legal status than the public sidewalks to

> which it is seamlessly connected to the north and south.

App. 12a-13a.

C. The Venetian Has Never Claimed That the Relocation of the Sidewalk Was an Uncompensated Taking.

The Venetian confuses the issue when it complains that the courts have "convert[ed] the Venetian's private sidewalk into public property without payment of any compensation at all." App. 22a.

The Venetian has never claimed that the re-routing of the Strip sidewalk was itself an uncompensated taking. The government widened Las Vegas Boulevard at the Venetian's request, to facilitate its new mega-resort. Petition at 3-4; App. 2a-3a. The agreement to pave over the existing public sidewalk and relocate it ten feet further east was part of a fair exchange of considerations. The Venetian has never argued that the repositioning of the sidewalk inside its property line was an unreasonable condition for the government to place on the project. Such an argument would have been futile. *See Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) ("[I]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere.")

The Venetian's only complaint is that people on that sidewalk are allowed to speak freely. It seeks a federal injunction to suppress any expression that the Venetian does not authorize. App. 53a.

REASONS FOR DENYING THE WRIT

I. THIS CASE TURNS ON THE CONSTRUCTION OF A SINGLE CONTRACT.

The main dispute in this case was whether the 1999 Agreement between the State and the Venetian creates an enforceable right of public passage. Much of the Venetian's petition is simply a point-by-point quibble with the Ninth Circuit's construction of the Agreement. Petition at 23-29. This was the main focus of Judge Brunetti's dissent, App. 32a-38a (section titled "The Language of the 1999 Agreement.")

A grant of *certiorari* would require the Court to parse the individual provisions of the Agreement. Does the requirement of "unobstructed public access" of ¶1, App. 20a, refer only to the Americans with Disabilities Act (as the Venetian urges but the Ninth Circuit rejected, App. 16a)? Does ¶7, obligating the Venetian "dedicate necessary right-of-way and to construct thereon a sidewalk . . . adjacent to Las Vegas Boulevard should the private sidewalk be removed, altered or abandoned" signal that the present sidewalk is similarly dedicated, App. 15a, or does it only create a quasi-dedication triggered only if the Venetian actually exercises some dormant private right, as the Venetian claims?

This is not an issue of national significance. *Certiorari* review of this case would be little more than a specific exercise in contract construction.

II. THIS CASE PRESENTS NO NEW QUESTION OF CONSTITUTIONAL LAW.

A. This Is Not a State-Action Case.

The Venetian misses the point when it dwells on state-action jurisprudence defining who may be sued under 42 U.S.C. §1983. Petition at 11-20.

The Ninth Circuit's decision does not expand the definition of state action, because the Venetian is not being sued as a state actor. The Venetian is a Takings Clause *plaintiff*. It is suing for an extraordinary remedy: it wants the federal courts to enjoin local law enforcement to "take the affirmative steps of warning, citing, or arresting those who engage in First Amendment activity to which the Venetian objects." App. 53a.

The Venetian lost this case, not because it has such extraordinary power that it is a state actor, but because it has much *less* power than an ordinary landowner. The Venetian simply does not have the property right it seeks to enforce.

If the Venetian were an owner in fee simple, this case would be quite different. The right to exclude others is an "essential stick in the bundle of rights that are commonly characterized as private property . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This is the property right successfully asserted against compulsory public access in Takings cases like *Kaiser Aetna, Dolan* and *Nollan v. California Coastal Comm.*, 483 U.S. 825, 831 (1987).

The normal property right to exclude is not in issue here, because the Venetian voluntarily gave it up. As a matter of law, pedestrians along Las Vegas Boulevard are not invitees of the Venetian. App. 17a-18a. Their use of the thoroughfare is grounded in an external public right that no longer depends on the Venetian's permission. App. 17a-18a. They have the right to speak freely, not because the Venetian is the government, but because foot traffic on the sidewalk is in the public domain. *Id.*

There is nothing novel about this result. Five years ago, this Court unanimously held that where an Indian tribe allows a highway through reservation land without reserving a gatekeeping right, it may not assert a landowner's right to regulate it. *Strate v. A-1 Contractors*, 520 U.S. 438, 455-456 (1997). "The Tribe's loss of right of absolute and exclusive use

and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Strate*, 520 U.S. at 456, *quoting South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). This is true even though Indian tribes have much greater sovereignty over their land than ordinary property owners, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-141 (1982). The Venetian is asking this Court to create a federal property right for non-Indians under the Fifth Amendment that this Court denies to sovereign Indian tribes. This would be an indefensible double standard.

B. The "Private Property" Label is Meaningless if It Conflicts with Reality.

The Venetian relies on the "private property" terminology inserted in various sections of the 1999 Agreement. Petition at 27-29. The Ninth Circuit followed the law when it held that this "private" label is meaningless if it masks the public nature of the servitude: "As the Supreme Court has recognized, simply declaring an entity to be private 'does not alter its characteristics so as to make it something other than what it actually is.'" App. 17a, *quoting Lebron v. National R. Passenger Corp.*, 513 U.S. 374, 393 (1995). The Venetian does not address *Lebron* nor the Ninth Circuit's application of it.

This is settled law. Just last Term, this Court reaffirmed *Lebron*: "[O]ur cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296 (2001) (*citing Lebron*.)

If pedestrian use is grounded in an external public right, any contrary labels in the 1999 Agreement "affected nothing but words." *Cf. Brentwood*, 531 U.S. at 301. If the public actually

has a recorded right of passage, the title "private sidewalk" does not change its legal character.

C. The Union May Defend Itself from an Unconstitutional Lawsuit Without Having to Show That the Plaintiff Is a State Actor.

The Venetian argues that private actors may not be restrained by the Constitution unless they are state actors, citing §1983 cases like *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Petition at 16-17. This argument confuses the offensive use of the Constitution (*i.e.*, suing private defendants as state actors under §1983) with its defensive use against private plaintiffs who demand unconstitutional remedies.

The Venetian is suing to enjoin the Union, not vice versa.[1] The Union's right to assert a constitutional *defense* is broader than a §1983 plaintiff's right to bring its own federal action for violations "under color of state law." These are "two separate areas of inquiry." *Flagg Bros.*, 436 U.S. at 155-156. In this case, the Union need only show the first element – that the Venetian's requested relief would be unconstitutional. This does not require the Court to decide whether the Venetian is the government.

The clearest example is *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). This Court held that civil defamation defendants may raise a First Amendment defense, even though their opponents are not state actors. 376 U.S. at 265. *New York Times* rejected the argument that a libel plaintiff must be the

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[1]The Ninth Circuit's opinion contains a clerical error on this point. It identifies the Union as an intervenor below. App. 5a. In fact, the Union was originally sued as a named defendant from the inception of this case, and it was required to defend itself from the Venetian's motion for a preliminary injunction against union speech on the sidewalk. 9th Cir. ER 1. The Venetian acknowledges this point, Petition at 6.

government for the First Amendment to apply. *Id.* It was enough that the plaintiff sought judicial remedies that would have punished speech in the public domain. 376 U.S. at 265. This is the same outcome threatened here.

D. The "Public Function" Test Is Settled Law.

1. Municipal sidewalks are public fora, regardless of title.

The Venetian asserts that the "public function" of private property is irrelevant, unless the property owner is first established to be a state actor. It cites *dictum* in *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995) *rev'd in relevant part, Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 737 (1996) and *Chicago Acorn v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695, 699 (7th Cir. 1998).

This general rule does not apply where property is dedicated to a core municipal function. The Venetian ignores *Evans v. Newton*, 382 U.S. 296, 298 (1966), where a park dedicated to public use was subject to the Constitution even though title had been transferred to private trustees. "Mass recreation through the use of the parks is plainly in the public domain [cit.om.]; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment." 382 U.S. at 302. "Public function" in this context did not depend on identifying the park trustees as owners of an entire company town. It was sufficient that the park was "municipal in nature." 382 U.S. at 301. This municipal-function rule applies to thoroughfare sidewalks, which are public fora "wherever the title . . . may rest." *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988), *quoting Hague v. CIO*, 307 U.S. 496, 515 (1939).

All nine Justices of this Court endorsed this aspect of *Evans* last Term in *Brentwood Academy*, 531 U.S. at 296 (majority),

see also id., 531 U.S. at 313 (Thomas, J. dissenting, joined by the Chief Justice, Scalia and Kennedy, JJ.) The majority cited *Evans* for the proposition that a nominally private entity may be a state actor when it is intertwined with governmental functions. 531 U.S. at 296. The dissenting justices' reading of *Evans*, although narrower, also embraced the "public function" rule relevant here:

> Our analysis [in *Evans*] rested on the recognition that the subject of the dispute, a park, served a "public function" much like a fire department or a police department. [Citing *Evans*] A park, we noted, is a "public facility" that "serves the community." *Id.* Even if the City severed all ties to the park and placed operation in private hands, the park still would be "municipal in nature," analogous to other public facilities . . ..

Brentwood, 531 U.S. at 313 (Thomas, J., dissenting).

The Venetian relies on lower court cases that deny public-forum status to private walkways only because they were not part of any municipal thoroughfare. Unlike the internal walkways of Chicago's Navy Pier in *Chicago Acorn*, which were "not through-routes [nor] part of the city's . . . transportation grid," 150 F.3d at 699, or the internal areas of shopping malls in *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) or *City of Jamestown v. Beneda*, 477 N.W.2d 830, 835 (N.D. 1991), the Strip sidewalk is a connecting piece of the City sidewalk system. It is not merely analogous to a public thoroughfare; it *is* a public thoroughfare.

Under this settled law, the sidewalk along the Las Vegas Strip is municipal in nature. It is part of the City's sidewalk system, and the public has a recorded right to use it as such. As the District Court held, "if ever there was a case where the protections of the First Amendment to the United States

Constitution should be applied to private property used for a particular public function, this is the case." App. 60a.

2. The divided decision in *S.O.C.* does not create a conflict.

The Venetian points to *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. Adv. Ops. No. 36, 23 P.3d 243 (2001) as a conflicting decision. Petition at 19-20.

In *S.O.C.*, the Nevada Supreme Court affirmed a preliminary injunction against pornographic commercial handbilling on a different part of the Las Vegas Strip sidewalk. The Nevada Supreme Court in *S.O.C.* was equally divided 3-3 on the issue relevant to this case – whether private land subject to a public right of passage is a public forum for First Amendment purposes. *Compare* plurality, 23 P.3d at 247-251 (Young, J., joined by Agosti and Becker, JJ.) *with id.* at 252 (Maupin, J., joined by Shearing J., concurring in the result) and *id.* at 254 (Rose, J., dissenting).

In disagreement with the three-justice plurality, the concurring Justices Maupin and Shearing and dissenting Justice Rose agreed with the U.S. District Court in *Venetian Casino Resort* that such a sidewalk is a public forum for First Amendment purposes. *See* 23 P.3d at 252 (concurrence); *id.* at 253-254 (dissent.) Justices Maupin and Shearing concurred in the judgment only because the pornographic handbills in *S.O.C.* were commercial speech, deserving less First Amendment protection than the labor speech in *Venetian Casino Resort*. 23 P.3d at 252.

The three-justice plurality opinion in *S.O.C.* is not an authoritative statement of a conflicting rule. Since the concurring justices' votes were necessary to create a majority in *S.O.C.*, the holding must be confined to the position of those justices who concurred on the narrowest grounds. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 765

n.9 (1988), *citing Marks v. United States*, 430 U.S. 188, 193 (1977). In Nevada, positions taken by only half of the participating justices are not binding law where they did not gain the support of a majority of the court. *See Forrester v. Southern Pacific Co.*, 36 Nev. 247, 281, 134 P. 753, 763 (1913), *cited in Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 22 n.7, 786 P.2d 22, 35 n.7 (1990) (Springer, J. concurring.)

In any event, *S.O.C.* involves sidewalks with different physical characteristics than this case, *see* 23 P.3d at 245 (describing wooden-plank sidewalk "elevated several feet off the ground and . . . separated from Las Vegas Boulevard by a public sidewalk that runs parallel to the plank sidewalk . . ."). A comparison between the properties in *S.O.C.* and this case would be a fact-specific exercise, not appropriate for *certiorari* review.

CONCLUSION

For these reasons, Respondent Local Joint Executive Board of Las Vegas respectfully urges that this Honorable Court deny the Petition.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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22pp

QUESTION PRESENTED

When a private business builds a private walkway on its privately owned land for a purpose expressly limited to pedestrian traffic, may a federal court—in conflict with the doctrine of the forum state's supreme court—declare the walkway an open-ended public forum, even to the extent of allowing throngs of protestors to occupy it as a staging ground for demonstrations against the business that built it and owns it?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus files this brief to assist in the consideration of important constitutional issues of property rights and expressive rights that are presented by this case. Pacific Legal Foundation (PLF) has an institutional commitment to a robust enforcement of both the Fifth and the First Amendments. For more than two decades PLF attorneys have been litigating in support of property rights as protected by the Fifth Amendment. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 835 (1987). Additionally, PLF attorneys have litigated to the highest levels in support of First Amendment rights. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1-(1990).

INTRODUCTION

May courts impose an unlimited public forum on a privately owned and maintained walkway, merely because the walkway is designed to serve pedestrian traffic and has the appearance of a traditional publicly owned sidewalk? The appeals court below answered in the affirmative, asserting that because the owners of the private walkway agreed to "unobstructed public use," the privately owned walkway assumes "the normal attributes of a *public* sidewalk." *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937, 943 (9th Cir. 2001) (emphasis added).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

To be sure, the court also noted that the privately owned pedestrian walkway in question, in front of the Venetian Casino Resort (the Venetian) along the Las Vegas Strip, was the successor to a publicly owned sidewalk that was uprooted when the Las Vegas Strip was widened. *Id.* at 944. But those particular facts are not the ultimate foundation of its ruling. Rather, the court issued a sweeping pronouncement that jeopardizes property rights on privately owned sidewalks no matter what their historical background: "Free speech is certainly incidental to pedestrian traffic," the court asserted, claiming that sidewalks "are the archetype of a public forum," (*id.* at 943 (citation omitted))–*apparently no matter who has title or what limits are placed on the invitation to the public.*

There is stark conflict between this ruling and the property-rights principles articulated by the Nevada Supreme Court when it issued a diametrically opposed opinion in a remarkably similar case. Nevada's highest court declared that *another stretch of privately owned walkway along the same street*—the sidewalk along the Las Vegas Strip, next to the Mirage Casino-Hotel—*is not a public forum.* The court declared that, even though the Mirage walkway is used by the general public for "sidewalk [] travel" (in the same way as the Venetian walkway)—*and even though the walkway might have been, like the Venetian walkway, a replacement for a publicly owned sidewalk*—there is no First Amendment right for pamphleteers to use it to hand out fliers promoting their business. *S.O.C., Inc. v. The Mirage Casino-Hotel*, 23 P.3d 243, 244-47 (Nev. 2001). The Court so ruled on the grounds that (1) the Mirage's walkway is privately owned (as is the Venetian's); and (2) the Mirage (again like the Venetian) has made it clear that it has opened its walkway to the public only for the limited purpose of pedestrian traffic. *Id.* So Nevada's highest court gave Fifth Amendment property rights a much

more robust application than the appellate court below was willing to do in a similar context, in the same zip code.

The case at hand involves more than abstract questions about expressive rights on private land. It has very concrete implications for every business thinking about building a sidewalk on its property to aid pedestrians. Can such a sidewalk be constructed without being conscripted as an unlimited public forum? Can the business that owns it be forced to let protestors use it to mount demonstrations aimed at blackening the company's name?

This Court has spoken definitively on these general issues. It has ruled that a business does not lose its property rights under the Fifth Amendment merely because it opens some of its property for a limited form of public use. It is well established in common law that property owners can explicitly or implicitly dedicate property for *limited* public uses without thereby opening the property to *unlimited* uses—and certainly without acceding to its being used as a staging ground for protests against the property owner.

This Court has also ruled that the First Amendment bars government from forcing a private party to provide a forum for a message not of the private party's choosing, at least not when the property owner's investment-backed expectations do not envision the property as a public forum.

The appellate court contradicts both of those teachings by ruling that protestors have a right to demonstrate on a private resort's privately owned walkway simply because the resort has opened the walkway as a pedestrian thoroughfare.

The rights of commercial property owners when confronted with claims that they must grant others the use of their property for expressive purposes is an important question

that has triggered litigation in many states. For all these reasons, this Court should grant the petition, in order to remind lower courts of the First and Fifth Amendment liberties that come with property ownership.

STATEMENT OF THE CASE

In order to accommodate increased traffic in the wake of the construction of the Venetian, Las Vegas Boulevard—the Las Vegas Strip—had to be widened. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 45 F. Supp. 2d 1027, 1030. (D. Nev. 1999). The additional lane took up the entire public right-of-way, requiring that the publicly owned sidewalk be taken out, and leaving no space for a new sidewalk. *Id.* So the Venetian promised in an agreement with the Nevada Department of Transportation, which owned the public land at issue, to construct a walkway on its own private property, parallel to the street. *Id.* But it did so only after going to considerable lengths to ensure that the walkway would be legally acknowledged as its private property, and that its use would be constricted. Under a January 9, 1999, agreement between the Venetian and the Nevada Department of Transportation, the Venetian pledged to build a walkway on its private property for pedestrian use–*but the agreement specified that the Venetian retained ownership and control.* Specifically, the Venetian would enjoy "'full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution.'" The walkway was designated specifically for "pedestrian access," and nothing more. *Id.*

Despite the fact that the walkway was private property and the Venetian opened it only for a particular, limited use, the County issued a demonstration permit to protestors so that they could occupy the walkway for a demonstration against the

Venetian. *Id.* at 1031. The Venetian responded by putting up signs stating that the pedestrian walkway was private property. *Id.* When the unions ignored these signs and held a mass demonstration, Las Vegas police, after consulting the District Attorney, refused to arrest or cite any of the demonstrators for trespassing. *Id.*

The trial court denied Venetian's claim that the city's facilitation of the protests amounted to an unconstitutional taking of property, and the appellate court affirmed, stating that protests were permitted because the walkway is a "normal . . . public sidewalk." *Venetian*, 257 F.3d at 943.

REASONS FOR GRANTING THE PETITION

I

THE RULING BELOW CONFLICTS WITH THE TEACHING OF THIS COURT, AND OF NEVADA'S HIGHEST COURT, THAT PRIVATE PROPERTY DOES NOT BECOME AN UNLIMITED PUBLIC FORUM MERELY BECAUSE THE OWNER OFFERS LIMITED ACCESS TO THE PUBLIC

A. The Ruling Below Conflicts with This Court's Teaching That Property Owners Do Not Surrender All Property Rights by Allowing Public Access for a Specific Purpose

The ruling below is astonishingly sweeping in finding that a sidewalk, even though privately owned, is a public forum—merely because it has been opened to the public for a specified use as a pedestrian walkway. The court imposes a public forum so absolute that the property owner must even allow hostile demonstrators to use the walkway as a staging ground for protests against the owner.

Granted, the particular walkway in question is the successor of a publicly owned sidewalk along a parallel government right-of-way that has been torn up for street-widening. *Venetian*, 45 F. Supp. 2d at 1029-30.

However, the appellate court, in finding that anti-Venetian protestors have a First Amendment right to demonstrate on the Venetian's walkway, does not ultimately base its decision on the historical facts in a way that might confine the ruling to this particular case. Rather, the court makes a sweeping assertion that could transform into public forums all privately owned sidewalks that serve as pedestrian thoroughfares. Relying on *Frisby v. Schultz,* 487 U.S. 474, 480 (1988), the court asserts that because the Venetian walkway is a "thoroughfare sidewalk," the anti-Venetian protestors have First Amendment rights on it, as sidewalks are the "archetype of a traditional public forum." *Venetian,* 257 F.3d at 948.

The problem with using *Frisby* to impose an open-ended public forum on privately owned walkways is that *Frisby* dealt with picketing on a *publicly owned* street. 487 U.S. 474. The Venetian's walkway has been acknowledged to be *privately owned*, under an explicit agreement with the Nevada Department of Transportation. The Venetian secured this understanding as a condition to building the sidewalk in the first place, so this understanding was part of the Venetian's investment-backed expectation regarding its property rights and the nature of the walkway. *Venetian*, 257 F.3d at 950.

While the agreement did explicitly bind the Venetian to design the sidewalk "for the purpose of providing unobstructed pedestrian access" (*id.* at 949), the court below is wrong in reading this fact as warrant to declare the walkway an unlimited public forum. Allowing pedestrians to travel from one point to another on one's property is not an open-ended grant of public

access. Granting permission for people to walk about is not the same as granting permission for them to stop and shout. *In particular, it is not the same as dedicating a forum so broad that it can be used by protestors to stage demonstrations against the owner of the property itself.*

The very fact that the Venetian bargained for and received assurances that the property remained private—that the owner retained "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution" (*id.* at 947),—indicates that whatever implicit dedication there might have been was a *limited* dedication. The court below has used the Venetian's limited grant of public access as an excuse to impose upon it a nearly unlimited obligation to open the walkway for expressive purposes. This imposition violates common law principles and the explicit teaching of this Court.

1. By Failing to Adhere to the Common-Law Principle That a Property Owner Can Open a Private Parcel for a *Limited Purpose*, the Ruling Below Creates a Conflict with the Supreme Court of Nevada

The appellate court below does not honor the principle that a property owner can open private property for particular public purposes without being forced to open it for *all* purposes. The court's conception of the question at stake shows no appreciation of such nuances, but presents, instead, an all-or-nothing proposition: "The issue before us is whether the sidewalk on private property that requires unobstructed pedestrian traffic is a public forum." *Id.* at 943.

Yet it is well-embedded in common law that rights in real property can be conveyed and acquired for strictly limited purposes, so that they do not extend beyond them. An implied

easement, for example, is "a creature of the common law" and does not extend to uses that would infringe the "use and enjoyment" of the property of the party who implicitly granted it. 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 23 (2000).

It can be inferred from traditional doctrines of easements and other rights-of-way that the Venetian did not make any dedication that would be broad enough to permit anti-Venetian protestors to use the walkway as a staging ground. For instance, a rule of tort law holds that, where sidewalks on private property are intended to facilitate pedestrian travel, activities unrelated to travel exceed the use of such property and subject the trespasser to liability. *S.O.C.*, 23 P.3d at 247 (citing *Restatement (Second) of Torts* § 192 (1981)).

Likewise, it is a rule of easements that there is a "duty of repair and maintenance to prevent unreasonable interference" with the servient estate, *Walsh v. United States*, 672 F.2d 746, 749 (9th Cir. 1982)—a doctrine that underscores the principle that uses of an easement or right-of-way are limited to activities that would not impair the easement grantor's estate. 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 23.

The foregoing principles are applicable, at least by analogy, to the case at hand. Interests in land can be conveyed in a calibrated way. The court below, however, refused to recognize the logical limits on the public use of the Venetian's privately owned walkway. By allowing anti-Venetian demonstrators onto the Venetian's property, the ruling causes "unreasonable interference" with the Venetian's business, impairing the grantor's estate. The court, in other words, *mandates* that the Venetian accept precisely the kind of misuse of a right-of-way on its property that traditional property-law principles *prohibit*.

In refusing to recognize that a grant of interest in property can be limited in scope, the ruling below conflicts with the highest court of Nevada. The court below declared the Venetian's walkway a public forum, even though title remains with the Venetian and an agreement with the state Department of Transportation recognized it as private. Yet further along Las Vegas Boulevard, a walkway also adjacent to the street, and built by the Mirage Casino-Hotel, has been recognized by the highest court of Nevada as the Mirage's private property—and *not* a public forum for expressive purposes. *S.O.C.* 23 P.3d at 245.

The Nevada Supreme Court upheld a preliminary injunction against commercial leafleters who came onto the Mirage's walkway without the Mirage's permission. *Id.* at 247. The court recognized that, while the walkway is used by the general public for "sidewalk travel"—and while the walkway might have been a replacement for earlier publicly owned sidewalks—the fact that it served as a right-of-way did not "convert private property to a public forum . . . ." *S.O.C.* 23 P.3d at 246. No public forum was established, because the easement was limited to pedestrian purposes and did not encompass expressive purposes. "The extent of an easement, like any other conveyance of rights in real property, is fixed by the language of the instrument granting the right." *Id.*

Whatever the classification of the right-of-way in the case at hand, the Venetian's agreement with the Nevada Department of Transportation specified and restricted it to "*pedestrian access*" (*Venetian*, 257 F.3d at 940, 942-43 (emphasis added)), so the limits are analogous to those on the Mirage walkway.

Because the court below did not show an appreciation for the limited nature of the Venetian's grant of access to the public, two diametrically opposed legal doctrines are being

applied on two different stretches of walkway along the same street in Las Vegas—one which honors property rights, and the other—the opinion below—which subverts them. This conflict can undermine confidence in the consistency and reasonableness of the legal system. The petition should be granted in order to replace this confusion with conformity.

2. The Decision Below Conflicts with This Court's Rulings That Have Clearly Recognized That Property Owners Can Limit the Nature and Scope of Access That They Offer the Public

The appellate court's designation of a privately owned and maintained walkway as a public forum conflicts not only with common law principle that property can be dedicated in limited ways without creating a public forum, but also with this Court's related teaching that "[property] does not lose its private character merely because the public is generally invited to use it for designated purposes." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). Hence, "[T]here is no federal constitutional right to trespass." *Planned Parenthood Association of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 300 (1996), *cert. den. sub nom. Cochran v. Planned Parenthood Association of San Mateo County*, 522 U.S. 811 (1997).

In *Pruneyard*, the court acknowledged that a public forum could be inferred from the layout of a sprawling shopping center. But even then, the extent of the public forum was limited by the property owner's "investment-backed expectations." *Pruneyard*, 447 U.S. at 83. For instance, the shopping center's owner would not have been creating a forum for activity that would "unreasonably impair the value or use" of the shopping center. *Id.* In the case at hand, the Venetian's investment-backed expectations when it built the walkway were

that, at most, it was opening a thoroughfare for pedestrians to walk from point A to point B. There could have been no reasonable expectation that it was dedicating an unlimited public forum when it took pains to negotiate language that confirmed its continued Fifth Amendment rights in the property. And certainly the Venetian's expectations would not have included the creation of a forum for anti-Venetian demonstrators.

If government wanted to ensure that First Amendment claims could be asserted against the Venetian walkway, it could have made the walkway public or quasi-public "by using its power of eminent domain for this 'public purpose;'" but "if it wants an easement . . . it must pay for it." *See Nollan v. California Coastal Commission*, 483 U.S. at 841-42. Neither state nor county officials, however, have exercised this power. To the contrary, not only is there no agreement reserving a public forum, there is an agreement denying anything but private ownership. *Venetian*, 257 F.3d at 950. The incursion of protestors is thus an incursion on *private property*. The court below contradicts this Court by failing to recognize that the Venetian's walkway could be opened for pedestrian purposes while not losing its fundamentally private character, and hence not being transformed into a public forum.

B. The Appellate Opinion Imposes a Taking on the Venetian, as Defined by the Test Reiterated in This Court's *Pruneyard* Ruling

This Court has said that when government compels a private property owner to give way to another party's expressive interests, three factors must be considered to determine whether a "taking" has occurred: the "character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard*, 447 U.S. at 83. (quoting *Kaiser Aetna v. United*

States, 444 U.S. 164, 175 (1979). Under that test, the opinion below imposes a taking on the Venetian. By compelling the Venetian to provide the walkway as a forum for anti-Venetian protestors, the opinion interferes with the Venetian's "investment-backed expectations;" the "economic impact" could be significant; and the "character of the governmental action" amounts to a physical invasion of the Venetian's property.

In building the walkway on its private property, the Venetian clearly had "investment-backed expectations" that it was granting only a pedestrian thoroughfare, that the public use would not extend beyond that purpose, and that the Venetian's rights in the property would be recognized. It did *not* have reason to expect that it was creating something that government would declare to be a public forum on which anti-Venetian demonstrators would have a "right" to stage protests. Its negotiation of an agreement with the government that acknowledged its "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution," demonstrates the Venetian's expectation that it would retain ultimate control over the walkway. *Venetian*, 257 F.3d at 950. While many international landmarks—the Sphinx, the Eiffel Tower, the Statue of Liberty—have been recreated in Las Vegas, the Venetian had no reason to expect that in putting a walkway on private land it was building a reproduction of Hyde Park Corner.

Indeed, this Court's *Pruneyard* ruling would give the Venetian an expectation that, even if it had been dedicating the walkway as a limited public forum, such a dedication wouldn't require it to provide a forum for anti-Venetian demonstrators.

In *Pruneyard*, the Court made it clear that, while the shopping center's investment-backed expectations included the

creation of a public forum, they didn't include the creation of a forum for activities designed to harm the shopping center's business. The owners' expectations weren't interfered with by the incursion of a handful of students politely passing out pamphlets unrelated to the business of the shopping center. However, the court indicated that things would have been different—that the shopping center's property rights would have been infringed—if it had been subjected to an incursion that would "unreasonably impair the value or use" of its business. *Pruneyard*, 447 U.S. at 83.

Just as the *Pruneyard* owners could not have had a reasonable, investment-backed expectation that they were creating a forum for anti-Pruneyard demonstrators, so the Venetian could not have had a reasonable, investment-backed expectation that building a sidewalk on its private property would offer a forum for throngs of anti-Venetian demonstrators. (The protest that gave rise to this lawsuit included 1,300 anti-Venetian demonstrators. *Venetian*, 45 F. Supp. 2d 1027.) In forcing the Venetian to play host to such demonstrators, the court interferes with the Venetian's legitimate, investment-backed expectations and therefore imposes a taking, under the test laid out in *Pruneyard*. The test's other two prongs are also implicated: (1) an anti-Venetian demonstration harm's the property owner's economic interests; and (2) the "character of [a] governmental action" that imposes a horde of demonstrators on private property is especially suspect under this Court's precedents.

In the decision that first delineated the second of those two prongs, this Court noted that "a 'taking' may more readily be found when the interference with property *can be characterized as a physical invasion by government* . . . ." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)(emphasis added)(citation omitted).

The petition should be granted because the appellate ruling did not defer to the test reiterated in *Pruneyard* for determining whether a taking has occurred when expressive interests are pitted against property rights.

II

THE APPELLATE RULING CONFLICTS WITH THIS COURT'S RULINGS AGAINST COMPELLED SPEECH

Only a superficial analysis would categorize this case as one that pits Fifth Amendment rights against First Amendment rights. In fact, those constitutional provisions are in harmony as regards the facts here. They are in accord in protecting the Venetian from being forced to provide a forum on private property for protestors who would stage demonstrations against the Venetian.

This Court has recognized that freedom of speech is a nullity if government can force on a party a message that is not necessarily of the party's choosing. It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). As noted above, the Venetian had an "investment-backed expectation" that the walkway would be private property incorporating the right to exclude. Yet the opinion below forces the Venetian's owners to play host on its private property to opinions manifestly not their own—indeed to protestors with an explicit anti-Venetian message. In condemning governmentally compelled speech, this Court has cited a famous statement by Thomas Jefferson: " '[T]o compel a man to furnish contributions . . . for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 n.31 (citation omitted) (1977). Because the opinion below departs

so dramatically from this principle, this Court should grant the petition.

III

THE ISSUES RAISED BY THIS CASE HAVE FAR-REACHING LEGAL AND POLICY IMPLICATIONS

At the center of this case are questions about whether and where private property interests must yield to claims of expressive rights. Scores of cases around the country in recent years have dealt with precisely this asserted conflict between free-speech interests and private-property rights. *See*, for instance, 13 such cases—with differing outcomes—listed at *S.O.C.*, 23 P.3d, 249 n.40. In addition, the California Supreme Court has in recent months accepted review of two cases in which signature-gatherers have asserted free speech rights against "big box" retail stores, claiming that their size and variety of products and services make them quasi-public fora. *See Young v. Raley's, Inc.*, 29 P.3d 795 (Cal. 2001), and *Waremart, Inc. v. Progressive Campaigns, Inc.*, 19 P.3d 1128 (Cal. 2001).

If uncertainty is allowed to prevail as to whether property rights must give way to other parties' claims of expressive interests, the policy implications could be significant and disturbing. Whatever the incentives might be for builders of resorts along Las Vegas Boulevard, developers of other commercial or office projects in other settings might be less inclined to include sidewalks in their plans, if they had reason to fear that sidewalks on private property are now to be declared places where people can stop and shout, and not just walk from point A to point B. Deterring developers from including sidewalks would frustrate the hopes of those urban planners who, following Jane Jacobs, author of "The Death and Life of Great American Cities," have argued that the "real assets of

neighborhoods . . .[are] diversity of use, human scale and *an active, pedestrian street life.*" Jacob Weisberg, *The Return of New York*, N.Y. Times, November 11, 2001, § 6, at 63 (emphasis added).

In order to prevent distortions in economic and development decisions that hinge on the stability of property law, and to provide guidance to lower courts on a property rights issue that is being widely litigated, this Court should grant the petition and review a ruling that makes property rights less predictable and less secure.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to grant the petition.

DATED: January, 2002.

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No. 01-918

IN THE

Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit's opinion below brushes aside one of the most basic and essential distinctions in constitutional law: between state action, which is subject to the First and Fourteenth Amendments, and private action, which is not. According to the Ninth Circuit, a strictly private entity is constrained by the First Amendment when controlling expressive activity on its own property whenever the property is thought to bear a physical and functional resemblance to a government-controlled "public forum." That conclusion, as the petition explains, conflicts with decisions of other courts recognizing that "public forum" doctrine is irrelevant to the antecedent question of state action, and also with decisions of this Court and other courts establishing that a private entity's control of expressive activity on its own property is subject to the First Amendment only in exceptional situations approaching the equivalent of a "company town."

All of that goes largely unchallenged by the Unions and ACLU in their briefs in opposition.[1] The Unions and ACLU do not defend the Ninth Circuit's misconceived reliance on public forum doctrine. Nor do they mount any serious effort to reconcile the opinion below with decisions of other courts on the issue of when a private entity's control of expressive activity on its private property can be said to constitute state action. Instead, the principal argument of the Unions and ACLU is that this case raises no issue of state action at all. They submit that the 1999 Agreement between Venetian and the State strips Venetian of its rights as property owner to control protests and picketing on its private sidewalk; and that this case therefore turns on the terms of that agreement, not on the question whether Venetian can be considered a

[1] The Government Officials have not filed a brief opposing the grant of certiorari, in accordance with their position throughout this litigation that they are neutral and will abide by any eventual judicial resolution of the constitutional status of Venetian's private sidewalk.

government actor constrained by the First Amendment.

That argument is unavailing. The dispositive question addressed and resolved by the opinions below is whether Venetian's control of expressive activity on its private sidewalk is subject to the First Amendment – in particular, the First Amendment standards that apply to governmental restrictions of speech in a government-controlled "public forum." This case thus squarely raises the state action issue presented in the petition. Significantly, that is so under any interpretation of the 1999 Agreement: a decision of the Nevada Supreme Court directly on point establishes that, even under the construction of that agreement pressed by the Unions and ACLU, Venetian *still* retains its property rights under Nevada law to control the use of its private sidewalk for expressive activity. Any restraint on Venetian's rights as property owner to control expressive activity on its sidewalk thus could only arise by operation of the First Amendment. Far from presenting a fact-specific question of contract interpretation, then, this case raises a highly significant issue of constitutional law, one as to which the opinion below is deeply flawed, sweeping in its implications, in conflict with decisions of other courts, and ripe for this Court's review.

I. THIS CASE SQUARELY PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The ACLU has stated that "the issues in th[is] case could conceivably have profound implications for free speech, not just here in Nevada, but nationwide." Elizabeth Amon, *Sidewalk spat*, Nat'l Law Journal (Jan. 28, 2002), at A1. But the ACLU and Unions describe the case quite differently in their briefs in opposition, submitting that it turns on the fact-specific terms of the 1999 Agreement and so presents no issue of broad significance. *See* ACLU Opp. 5-8; Unions Opp. 6. That argument is without merit.

1. Venetian filed this action seeking a declaratory judg-

ment that its private sidewalk cannot be considered a "public forum" for First Amendment activity, and the ACLU filed a counterclaim for a declaration that the private sidewalk is a "public forum" under the First Amendment.[2] Venetian's contention throughout this litigation has been that, as a private entity, its control of its own private sidewalk is not subject to First Amendment constraints; and that question is dispositive in both opinions below. But the ACLU and Unions now submit that there is no need to address whether the First Amendment constrains Venetian's efforts to control protests on its private sidewalk, asserting that Venetian – as a result of the 1999 Agreement – lacks any property right to control expressive activity on its sidewalk in the first place. *See* Unions Opp. 7-8; ACLU Opp. 8-9.

That assertion is squarely foreclosed by the Nevada Supreme Court's controlling decision in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). There, the casino owner of a private sidewalk had explicitly conveyed to the public a "pedestrian easement" on the sidewalk, *see id.* at 245, but the court held that, as a matter of Nevada property law, the easement did not affect the casino's entitlement as property owner to prohibit handbilling and leafleting on its sidewalk, *see id.* at 246-47. The court found that the "existence of the easement does not implicate the protections of the First Amendment" and is "insufficient to convert private property to a public forum" for expressive activity. *Id.* at 246. The concurring opinion expressed no disagreement with that understanding of Nevada law. Instead, the concurrence embraced the rationale of the district court opinion in

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[2] The Unions appear to believe that Venetian seeks injunctive relief, *see* Unions Opp. 7, but the complaint only requests a declaratory judgment. Venetian sought a preliminary injunction in the district court, but that request became moot upon the court's entry of judgment on Venetian's underlying claims (and on the ACLU's counterclaim) for declaratory relief. Those claims are in issue here.

this case, *see id.* at 252 (Maupin, C.J., concurring), which holds that Venetian *retains* its state law rights as property owner to control expressive activity on its private sidewalk, *see* Pet. App. 56a-57a, but that its efforts in that regard constitute government action and so are subject to First Amendment requirements, *see id.* at 57a-60a.

As a result, even accepting the view of the Unions and ACLU that the 1999 Agreement dedicates a pedestrian right-of-way to the public, *S.O.C.* settles that Venetian *still* possesses its full state law rights as private property owner to control the use of its private sidewalk for expressive activity. Any limitation on Venetian's property rights in that regard thus could arise only by operation of the First Amendment, squarely and necessarily raising the question of state action presented in the petition. And as the petition explains (*see* Pet. 11-19), the Ninth Circuit's flawed approach to the question of state action warrants this Court's review: the central failing of the opinion below, and the reason it conflicts with decisions of other courts, is that it jumps to an application of public forum doctrine without first undertaking any conventional inquiry into state action. Because the need to establish state action arises regardless of how one construes the 1999 Agreement, addressing the Ninth Circuit's misconceived reliance on public forum doctrine and rectifying its failure to apply the traditional tests for state action would not involve interpreting the agreement's terms.

In addition, the Ninth Circuit's construction of the 1999 Agreement was just one of several factors that led the court to determine that Venetian is subject to the First Amendment when controlling protests on its private sidewalk. In summarizing the reasons for its holding, the opinion below lists a number of considerations pertinent to public forum doctrine: "the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas' network of

public sidewalks, and its dedication to public use under the Venetian's 1999 Agreement with the Department." Pet. App. 19a. Only the last of those depends in any way on interpreting the 1999 Agreement. The remaining factors all relate to the physical and functional characteristics of Venetian's private sidewalk, and have nothing whatsoever to do with the terms of the 1999 Agreement. But by placing principal weight on the supposed physical and functional resemblance of Venetian's sidewalk to a government-controlled "public forum," the opinion below – entirely apart from its interpretation of the 1999 Agreement – conflicts with the state action decisions of this Court and other courts.[3] And without the weight of those factors, the result below could not stand, as the circumstances do not implicate the narrow situations in which a private entity's control of expressive activity on its own property is subject to the First Amendment. *See infra* at 9-10.

2. The 1999 Agreement not only fails to present any basis for denying certiorari; but the terms of the agreement in fact *bolster* the case for granting review. That is because, as a result of the Ninth Circuit's opinion below, a property owner's clear preservation of its private property rights will be of no consequence if its property bears a physical and

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[3] *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action"); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972) (rejecting "suggestion that privately owned streets and sidewalks of a business district . . . are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"); *United Auto Workers, Inc. v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 (4th Cir. 1995) ("It is not enough to establish state action . . . that an owner opens up his property for use by the public in general."); *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) ("[I]n determining whether the First Amendment protects petitioning or other political activity on private property, the test is not whether that property amounts to the 'functional equivalent' of a public forum.").

functional likeness to a government-controlled public forum. *See* Pet. 23-29. In those circumstances, the private entity will be treated as the government and its property will be treated as public property, notwithstanding the entity's specific protection of its rights as property owner.

After all, it is difficult to imagine how Venetian could more clearly have preserved its property rights and reinforced that there was no dedication of its property to the public: the agreement unfailingly specifies that the sidewalk is "private," it emphasizes that Venetian "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments," it confirms that the State "is not taking any private property interest," it assigns to Venetian all responsibility for maintaining the sidewalk and all liability arising from its use, and it makes clear that any dedication of a right-of-way could only arise in the future in the event that Venetian removed or abandoned its private sidewalk, which (undisputedly) has not occurred. Pet. App. 20a-22a. But the opinion below nonetheless refuses to give effect to Venetian's unequivocal preservation of its property rights, based on the private sidewalk's perceived functional and physical resemblance to a government-controlled public forum. The Ninth Circuit's misplaced reliance on public forum doctrine, to the point of dismissing altogether a private entity's explicit protection of its property rights, calls for this Court's review.[4]

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[4] The efforts of the Unions and ACLU to defend the Ninth Circuit's interpretation of the agreement are wholly unpersuasive. For instance, while the agreement is recorded and binding on successors (*see* Unions Opp. 1), development agreements containing land use conditions are recorded and made binding on successors as a matter of course, regardless of whether they dedicate property to the public (for instance, even if they simply require set-back areas or landscape buffering). *See* Nev. Rev. St. § 278.0203(2). Also, any reliance on selected responses of Venetian's counsel in a hearing in the district court is entirely misplaced (*see* Unions Opp. 2-4) in view of the district court's conclusion that Venetian pre-

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS AND IS INCORRECT ON THE MERITS.

1. The Unions and ACLU make no serious effort to address the conflicts between the opinion below and the decisions of other courts. *See* Pet. 12-20. They devote the bulk of their attention to addressing the Nevada Supreme Court's decision in *S.O.C. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Unions Opp. 12-13; ACLU Opp. 12-14. It is true, as the Unions and ACLU observe, that the principal opinion in *S.O.C.* was not joined by a majority of the court. But the principal opinion announces the court's judgment, it was joined by more members of the court than any other opinion, and it is assumed by the other opinions to constitute a "majority" holding. *Id.* at 252 (concurrence); *id.* at 252-54 (dissent). And the apparent practice in Nevada is that, where a "quorum of . . . Justices has concurred in the judgment," the "reasoning and holding of the plurality view [is] binding unless and until overruled" by a majority of the court. *Craigo v. Circus-Circus Ents.*, 786 P.2d 22, 28 n.7 (Nev. 1990) (plurality). At the very least, the conflict between the principal opinion in *S.O.C.* and the Ninth Circuit's decision below has given rise to a great deal of confusion.[5]

In any event, the Unions and ACLU essentially do not

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served its full private property rights, the Unions' written concession that the agreement preserves Venetian's right to exclude, and the Government Officials' acknowledgement that there is no public right-of-way on the sidewalk. *See* Pet. 28 n.14. The Ninth Circuit's contrary conclusion that the agreement does dedicate a right-of-way to the public is inexplicable, and confirms that the court's overriding concern is with whether the property, although privately owned and controlled, bears a physical and functional resemblance to a government-controlled public forum.

[5] *See* Steve Sebelius, *The politics of sidewalks*, Las Vegas Review-Journal (Jan. 3, 2002) (available at http://www.lvrj.com/cgi-bin/printable.cgi?/lvrj_home/2002/Jan-03-Thu-2002/opinion/17789951.html).

deal with the broader conflicts addressed at length in the petition. In particular, the opinion below cannot be squared with decisions recognizing the irrelevance of public forum standards to the antecedent question of state action (*see* Pet. 12-16), or with decisions establishing that a private entity's control of expressive activity on its own property implicates the First Amendment only in exceptional circumstances involving the equivalent of a "company town" (*see* Pet. 16-19). The sole contention of the Unions and ACLU in respect to those decisions is that this case involves a "thoroughfare" sidewalk that connects public sidewalks on either side, as opposed to an internal walkway or a sidewalk used principally for ingress and egress. *See* Unions Opp. 11; ACLU Opp. 12. As the petition explains (*see* Pet. 14, 18), however, the distinction in public forum doctrine between thoroughfare and non-thoroughfare sidewalks is entirely irrelevant to the antecedent question of state action. Until the opinion below, no decision had suggested otherwise.

2. The Unions and ACLU fare no better in their effort to justify the Ninth Circuit's decision on the merits. They place principal reliance on this Court's opinion in *Evans v. Newton*, 382 U.S. 296 (1966). *See* Unions Opp. 10-11; ACLU Opp. 9-11. Contrary to the view of the Unions and ACLU, however, *Evans* in no way stands for the proposition that the operation of a privately owned park for recreational purposes is inherently a municipal function that subjects the private owner to constitutional constraints. "[A]ny such broad doctrine," this Court has explained, could not be squared with "the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 n.8 (1978). *Evans* instead "rests on a finding of ordinary state action in extraordinary circumstances," in that "the transfer of title" to the park from the city "to private trustees" did not alter "the actual involvement of the city in the daily maintenance and care of the park." *Id.* Here, by contrast,

there is no government involvement in the maintenance and control of Venetian's private sidewalk: indeed, the 1999 Agreement explicitly absolves the State of any responsibility in that regard. *See* Pet. App. 20a (¶¶ 4-5).

The reliance of the Unions and ACLU on *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), and *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995) is misplaced for essentially the same reasons. *See* Unions Op. 8, 10-11; ACLU Opp. 10-11. In *Brentwood Academy*, the "pervasive entwinement of public institutions and public officials in [the] composition and workings" of a "nominally private" association persuaded the Court to treat the association as a state actor subject to constitutional requirements. 531 U.S. at 298. *Lebron* is to the same effect. There, the Court found that Amtrak is a government actor constrained by the First Amendment because the government created the company to promote governmental objectives and controls the company's operations through its authority to appoint a majority of the company's directors. *See* 513 U.S. at 394-400. Here, of course, no governmental body controls Venetian's operations or participates in its decision-making, including in its management and control of its private sidewalk.

The relevant state action cases instead are the line of decisions applying *Marsh v. Alabama*, 326 U.S. 501 (1946), which the Unions and ACLU do not address. Here, as in those cases, Venetian possesses state law rights as private property owner to restrict the use of its private sidewalk for expressive activity. *See supra* at 3-4. The question is whether Venetian nonetheless might be required by the First Amendment to allow protests and picketing on its private sidewalk. The clear answer is no: privately owned property can "be treated as though it were public" for purposes of subjecting the private owner to First Amendment constraints only if the "property has taken on *all* the attributes of a town,

i.e., residential buildings, streets, a system of sewers, a sewage disposal plant, and a business block." *Flagg Bros., Inc. v. Brooks*, 436 U.S at 159 (emphasis in original) (internal quotation marks omitted). There is "nothing in *Marsh* which indicates that if [only] one of those features is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it." *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976) (quoting *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 322-23 (1968) (Black, J., dissenting)).[6]

But that is exactly the effect of the Ninth Circuit's decision below – it forces Venetian to make room on its own private sidewalk for protests and picketing deliberately designed to injure its own commercial interests. That outcome is flatly prohibited by this Court's decisions: "'To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country.'" *Id.* (internal quotation marks omitted). The contrary determination of the opinion below warrants this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

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[6] *Cf. Flagg Bros.*, 436 U.S. at 115 (explaining that the Court's decision in *Hudgens* "adopt[s] Mr. Justice Black's interpretation of the limited reach of *Marsh*").

Respectfully submitted,

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No. 01-918

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

VENETIAN CASINO RESORT, L.L.C.,

Petitioner,

—v.—

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, *et al.*,

Respondents,

—and—

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Once a property owner has given up a permanent right-of-way for municipal sidewalk traffic, does it suffer a Fifth Amendment taking when pedestrians exercise free speech rights on the thoroughfare?

CORPORATE DISCLOSURE STATEMENT

The ACLU of Nevada is a separately incorporated not-for-profit entity affiliated with the American Civil Liberties Union. It has no stock and no parent corporation.

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STATEMENT OF THE CASE

This case involves a contractual dispute about the scope and effect of a recorded servitude contained in a real property contract requiring unobstructed pedestrian use along a privately owned and maintained sidewalk which replaced the public sidewalk that was demolished when the Venetian was built in 1999. The 1999 contract between petitioner, Venetian Casino Hotel and Resort, and the Nevada Department of Transportation (NDOT), was required by an earlier development agreement with the county for the construction of the property. App. 2a-3a. The Venetian is one of numerous hotel-casinos along Las Vegas Boulevard, also known as "The Las Vegas Strip." The sidewalk runs along Las Vegas Boulevard in front of the Venetian and is contiguous on both ends with public sidewalks running parallel to and abutting the street for the entire length of the Strip.

Tens of thousands of visitors and residents walk along these sidewalks daily as part of the "Las Vegas experience." Las Vegas Boulevard is the major traffic artery anchoring the major tourist district in Las Vegas. The sidewalk at issue is, by design, incorporated into the pedestrian traffic grid along the Strip and is the only means for pedestrians to walk down the street on the east side of the Boulevard. The unobstructed pedestrian use required by the agreement entered into between the Venetian and NDOT is enforceable by a separate provision of the contract requiring the Venetian to grant a right of way to the Department in the event pedestrian use is obstructed. The servitude and the other terms of the agreement run with the property and are binding on all successors. App. 2a-3a.

The circumstances which led to the construction of the Venetian and the dedication of the servitude are accurately set forth in the Statement of the Case prepared by respondent Local-Joint Executive Board of Las Vegas, Culinary Workers Local 226 and Bartenders Union Local

165, AFL-CIO (collectively, "the Union"), and the Ninth Circuit's Statement of the Case. App. 2a-4a. The ACLU of Nevada and Gary Peck (collectively "the ACLUN") incorporate both statements herein.

We write separately to emphasize that petitioner's dedication of the servitude is not only established by the 1999 contract entered into with NDOT, but also by a binding development agreement entered into in 1997 with Clark County requiring dedication of a right-of-way as part of the development agreement and approval process. The two agreements must be read together because approval of the development of the Venetian was dependent on compliance with the terms of both agreements. The Ninth Circuit's decision only looked to the 1999 NDOT agreement because Las Vegas Boulevard is on a state right-of-way. However, the right-of-way providing pedestrian passage along Las Vegas Boulevard is contractually required under the terms of both documents.

As part of the development process it was necessary for the Venetian first to enter into an agreement with Clark County officials. App. at 49a. That agreement required the construction of various improvements to the streets and sidewalks to facilitate vehicular and pedestrian traffic along the Venetian's frontages on Las Vegas Boulevard South, commonly referred to as the "Las Vegas Strip," and any improvements recommended by a traffic impact study. App. 49a. The 1997 agreement also contains the following provision where the developer agrees to turn over proposed public property rights:

> DEVELOPER agrees to convey all proposed public property rights owned by the DEVELOPER to the COUNTY or the State of Nevada Department of Transportation, at no cost or expense, free and clear of all liens, covenants, restrictions and encumbrances. as required for

> construction, maintenance or use of the IMPROVEMENTS . . . . Any conveyance of land by the DEVELOPER to the COUNTY or the State of Nevada, for public use of sidewalks, walkways or other forms of pedestrian passage through the DEVELOPMENT, will be for facilitating the perpetual flow of pedestrian traffic . . . without restrictions. App. 49a.

Following the acceptance of the Agreement, the Venetian completed the required traffic impact study, which concluded that traffic would be accommodated by widening Las Vegas Boulevard and adding another northbound lane. That solution, however, required destruction of the existing sidewalk leaving no means for pedestrians to walk down the street. Pet.App. 50a. Since the public land at issue belonged to the State of Nevada, rather than the County, the Venetian was required to negotiate with NDOT in order to affect the changes required by the 1997 Clark County Agreement.

Despite the plain language of the 1997 and 1999 contracts dedicating the sidewalks to the public use as a pedestrian thoroughfare, the Venetian argues that the provision in the NDOT agreement granting the hotel "full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendment[s] to the United States Constitution" afford it the absolute discretion to prohibit any and all speech it disapproves of. Petitioner further argues that the failure of Defendants Clark County and the Las Vegas Metropolitan Police Department to arrest those who engage in such "disapproved" expression constitutes an uncompensated "taking" in violation of the Fifth and Fourteenth Amendments. Yet, neither this provision nor any other provision in the agreement confers upon the Venetian the right to exclude protestors or otherwise suppress speech. The fact that petitioner now apparently regrets the

terms of its own negotiated agreement does not entitle it to seek the assistance of local law enforcement in removing disfavored speakers from a public forum.

REASONS FOR DENYING THE WRIT

The petition for *certiorari* attempts to create a constitutional mountain out of a contractual molehill. We respectfully submit that the petition should be denied for the reasons set forth below, in addition to the reasons set forth by respondent Union in its opposition.

First, as both the majority and dissent below recognized, there is less disagreement about the legal principles in this case than about the precise meaning of particular contract provisions. However important that contract dispute may be to the parties involved, its fact-specific nature does not present an issue of general significance and does not warrant this Court's plenary review.

Second, even if petitioner's construction of the contracts were assumed to be correct, the Venetian would not be entitled to the relief sought in this case. The hotel-casino agreed to open up its property to unobstructed pedestrian use in order to resolve the issue of pedestrian passage required as part of the approval process in the 1997 development agreement with the County and the 1999 agreement with the NDOT. Both of these agreements were undertaken at the Venetian's initiative. By giving up the right to exclude the public from its property and agreeing to perform a municipal function, the basis for petitioner's claim that local authorities have unlawfully taken its property in violation of the Fifth and Fourteenth Amendments is completely undermined. Yet, these are the only claims raised by petitioner in this case. At the very least, this case does not clearly and directly present the Fifth Amendment takings and Fourteenth Amendment due process claims alleged by the Venetian.

Those issues are clouded by petitioner's voluntary decision to construct and maintain a public sidewalk that is private in name only.

Furthermore, even if this case is analyzed in the abstract, divorced from the actual agreements involved, petitioner overstates the importance of the issues at stake here. There is nothing remarkable or legally significant about the issues in this case or the Ninth Circuit's treatment of them. Petitioner has voluntarily taken on a traditional governmental role. Thus, the Venetian may be held constitutionally accountable for its actions. This Court's cases have long held that private property and private parties may be subject to constitutional requirements in circumstances where they are performing a public function. Applying those cases, the Ninth Circuit correctly held that petitioner was constrained by constitutional requirements because it voluntarily assumed the responsibility of local government when it agreed to replace the public sidewalk with its own sidewalk.

Finally, this case does not conflict with any decisions from other courts. No other Circuit has ruled differently from the Ninth Circuit. Moreover, petitioner mischaracterizes the holding of a Nevada Supreme Court case in an attempt to draw this Court into a non-existent conflict. The Ninth Circuit's decision is firmly in line with those of this Court and others.

I. THE CENTRAL DISPUTE IN THIS CASE INVOLVES THE CONSTRUCTION OF SPECIFIC CONTRACTUAL LANGUAGE RATHER THAN ANY OVERARCHING CONSTITUTIONAL CONFLICT

Despite the Venetian's assertions to the contrary, this case is less about a dispute concerning an overarching constitutional dispute between free speech and property rights

than it is about the construction of specific contract language. The majority below construed that contract language as a clear expression of the parties' intent to provide the public with all of the rights on the replacement sidewalk that it had enjoyed on the previous sidewalk, including the right to free speech associated with a public forum. Pet.App. 19a. The dissent by Judge Brunetti disagreed with the majority's construction of the relevant contract language, but not with its view that the outcome of this case turns on the fact-specific meaning of particular contract provisions read in their unique context.

> I agree with the majority that, if the Venetian had truly given the public an explicit right to its property in the 1999 Agreement, then this sidewalk would indeed fall within the ambit of the First Amendment. This is in essence a matter of contract interpretation, and I believe that close scrutiny of the circumstances that led to the contract and the plain language of the contract itself, as well as the history of the piece of property at issue and its physical characteristics, will compel an entirely different conclusion than that arrived at by the majority.

Pet.App. 27a-28a.

In construing the contract language, the majority below expressly rejected petitioner's claim that it had reserved the right to exclude anyone it chose from access to the replacement sidewalk. After carefully reviewing the contested provisions, the court below concluded that petitioner had in fact contractually agreed to guarantee the public unobstructed access to the replacement sidewalk as part of a comprehensive development plan that included widening Las Vegas Boulevard to accommodate a projected increase in traffic. As the court of appeals further noted, this *quid pro quo* was properly memorialized by the parties:

> Thus, there is a recorded servitude on this parcel of private property upon which the replacement sidewalk is located that the Venetian and its successors and assigns dedicate to public use to provide unobstructed pedestrian access on that sidewalk. The recorded agreement also provides in Paragraph 7 that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.

Pet.App. 8a-9a.

Petitioner's belated objection to its own negotiated agreement is both unpersuasive and inconsistent. At the district court hearing concerning the Venetian's unsuccessful motion for a preliminary injunction, the hotel's attorney acknowledged the public's right to use the sidewalk as part of the uninterrupted pedestrian path along Las Vegas Boulevard. Pet.App. 7a-8a. Moreover, he acknowledged that this right included "all incidental activity." *Id.* at 9a. In response to that concession, the Ninth Circuit made the unexceptional observation that "free speech is certainly incidental to pedestrian traffic." Pet.App. 9a, citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Both on appeal to the Ninth Circuit and before this Court, petitioner has attempted to disavow its earlier concession by arguing that the reference in the contract to "unobstructed public access" was only meant to ensure compliance with the Americans with Disabilities Act. But, as the Ninth Circuit bluntly stated, "this corresponds neither with the statements to the district court nor with other references in the agreement." Pet.App. 8a. In any event, whatever disagreement may exist about the particular scope of this par-

ticular contract is necessarily fact-specific and does not warrant plenary review by this Court.

II. THE CASE DOES NOT CLEARLY AND DIRECTLY PRESENT THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS RAISED BY PETITIONER IN ITS COMPLAINT

Petitioner's statement of the question presented focuses exclusively on the issue of state action. The Venetian accuses the Ninth Circuit of putting the cart before the horse by holding it to constitutional requirements without explicitly finding state action. Yet, petitioner has it backwards. The problem with petitioner's formulation is that it is unnecessary to reach the state action question in order to dispose of its Fifth Amendment takings and Fourteenth Amendment due process claims. No property interest has been taken or impaired in this case because petitioner consented to unobstructed pedestrian passage in order to obtain approval for its plans to construct the casino. By focusing on state action instead of the theory of its own case it is petitioner, rather than the Ninth Circuit, that has placed the cart before the horse.

In *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994), this Court stated that "[d]edication for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from proposed property use" and not a constitutional taking. More importantly, when the Venetian agreed to replace the existing sidewalk with a new sidewalk to resolve the issue of pedestrian passage along Las Vegas Boulevard, it explicitly consented to this use of the property, thus giving up the right to exclude the public. This is the touchstone of the inquiry under the Fifth Amendment Takings Clause. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Nollan v. California Coastal*

Comm., 483 U.S. 825, 831 (1987). The Venetian simply does not have the property right it now seeks to enforce. Without that right, there can be no Fifth Amendment or Fourteenth Amendment loss of property.

III. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS AS ASSERTED BY THE PETITIONER AND PRESENTS NO SIGNIFICANT LEGAL ISSUE

Petitioner greatly exaggerates the legal significance of the issue in this case and attempts to draw the Court into an abstract dispute about the imperilment of property rights that does not exist here. It asks the Court to analyze this case divorced from the facts and from the agreements it voluntarily entered into with Clark County and the Nevada Department of Transportation. Petitioner seeks to totally distance itself from any obligation to maintain a publicly accessible sidewalk or any duty under those agreements. The Ninth Circuit correctly rejected this attempt to sidestep petitioner's own agreements.

Petitioner cannot have it both ways. Once having obtained approval to demolish the old sidewalk and build the casino it cannot walk away from its promise to provide unobstructed pedestrian passage. The agreements did not give the Venetian a new right to prevent people from walking down the street. Nor can this case mask the unmistakable public function that petitioner has undertaken. Holding petitioner to constitutional requirements under the circumstances present in this case is hardly controversial.

The Court in *Evans v. Newton*, 382 U.S. 296 (1966), was faced with a similar question of whether privately owned property could be held to constitutional standards. The property at issue was a segregated private park held in trust for the public's benefit that had assumed a municipal

function. Just as the Venetian contends here, the private trustees of the park in *Evans* argued they could circumvent the Constitution's reach because title to the park rested with them rather than with the City. Emphasizing that the mere fact of private ownership was not enough to divest the park of its "public character," the Court held that the Fourteenth Amendment applied "regardless of who now has title under state law." *Id.* at 302.[1]

The principle articulated in *Evans* was recently reaffirmed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288, 296 (2001); *id.* at 313 (Thomas, J., dissenting). There, all nine Justices of the Court reiterated that the public function of private property might subject it to constitutional requirements. The majority cited *Evans* for the proposition that a nominally private entity may be a state actor when it is intertwined with governmental functions. *Brentwood Academy*, 531 U.S. at 296. The dissenting justices' reading of *Evans*, although narrower, embraced the public function rule relevant here:

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The decision below does not break new ground, nor does it present the grave danger to private property interests that petitioner asserts. If petitioner has a quarrel, it is with the facts, not the law. As *Evans* and its progeny show, this Court has long recognized that sidewalks dedicated to public use and incorporated into the local transportation grid are "municipal in nature," 381 U.S. at 301. Contrary to the Venetian's position, the right to assemble and communicate in such spaces may not be abridged or denied regardless of the formalities of ownership. *See Hague v. CIO,* 307 U.S. 496, 515 (1939)("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.") *See also Frisby v. Schultz*, 487 U.S. 480.

The Venetian devotes the bulk of its petition to arguing that it is not a state actor in some general sense, but that mischaracterizes the issue. By agreeing to maintain a public sidewalk with unobstructed public access, petitioner has assumed both a public function and the First Amendment con-

straints that come with it. Moreover, even a private party may not invoke the coercive powers of the state to exclude a disfavored speaker from a public sidewalk -- the quintessential public forum -- because of disagreement with the message the speaker seek to deliver. *See New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

IV. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER COURTS

Finally, petitioner has not identified any meaningful conflict that requires this Court's intervention or resolution. In support of its asserted conflict, petitioner primarily relies on a series of state and federal decisions involving shopping malls. Pet. at 14-15. As the Ninth Circuit noted, however, those decisions are easily distinguishable from the present controversy.

> In none of the cases cited by the Venetian does the privately-owned property at issue possess all the attributes of a public forum possessed by the sidewalk in front of the Venetian. As a "thoroughfare sidewalk," seamlessly connected to public sidewalks at either end and intended for general public use, the sidewalk in front of the Venetian is "the archetype of a traditional public forum."

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Petitioner's reliance on an alleged conflict between the Ninth Circuit and the Nevada Supreme Court is similarly misguided. On pages 19-20 of its brief petitioner argues that the Ninth Circuit's decision directly contradicts the Nevada Supreme Court's conclusions in *S.O.C., Inc. v. Mirage Casino Hotel,* 23 P.3d 243 (Nev. 2001). A review of that case indicates otherwise. The case was decided on May

17, 2001, after the district court ruled in *Venetian*, but prior to the Ninth Circuit's ruling. *S.O.C.* was an *en banc* decision by six of the seven members of the Nevada Supreme Court. *Id.* at 244. Justice Leavitt voluntarily recused himself from the case. *Id.* at 251, n.51.

While the Court voted 5 to 1 to uphold the preliminary injunction at issue it was evenly split on the question of whether the sidewalk in question is a public forum. Three of the Justices in Justice Young's opinion stated that despite the pedestrian easement the sidewalk was not a public forum. *Id.* at 247. The concurring opinion by Justices Maupin and Shearing agreed with the results but disagreed on the issue of the public forum status of the sidewalk.

> The basic question in this matter was convincingly settled in *Venetian Casino Resort v. Local Joint Executive Board*. 45 F.Supp. 2d 1027 (D.Nev. 1999). In *Venetian*, the defendant unions obtained a permit to picket in a private pedestrian walkway fronting the Venetian Casino Resort. That sidewalk is directly across the street from, and in every relevant respect identical to, the properties at issue in the instant matter. The federal district court concluded that the Venetian property "was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment." *Id.* at 1036. This exception must also apply here.

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Justice Rose's dissenting opinion likewise treated the sidewalk as a public forum.

> The real property in question consists of two traditional sidewalks abutting Las Vegas Boulevard that are traversed daily by thousands who use the sidewalks as a principal thoroughfare along the city's most famous stretch of casinos, the Las Vegas Strip. By the very location and function of the sidewalks, I think it is impossible not to conclude that they serve as traditional public sidewalks. Similar thoroughfares, whether publicly or privately owned, have been recognized as public forums on which all First Amendment rights must be recognized and honored. Therefore, I disagree with the majority's conclusion that the area in question is not a public forum.

Id.

In light of the Nevada Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a "concrete conflict" between the State Court and the Ninth Circuit "that can only be resolved by this Court," Pet. at 20, is incorrect.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: January 28, 2002

work" for her and they wrongly accused her of stealing customers from other salespersons. Further, Johnson alleges that Irwin allowed other employees to falsely accuse her, gave sales leads to other employees and advised them to come to work early to do stock work so they would not lose time off the sales floor. Archer and Irwin apparently also monitored Johnson to determine whether she was in fact stealing customers. In November 1997, Johnson resigned.

Johnson filed a complaint against Nordstrom, James Johansson (the store manager) and Archer under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. She alleged race discrimination in the failure to promote her, retaliation and constructive discharge. As noted, her retaliation claim consisted of, inter alia, Nordstrom's failure to promote her to the assistant manager position and Irwin's and Archer's retaliatory conduct. Johnson also alleged a state claim for intentional infliction of emotional distress. In response, Nordstrom filed a motion for summary judgment and a motion to strike certain portions of affidavits filed by Johnson. Johnson filed a motion in opposition to summary judgment and a motion to strike affidavits submitted by Nordstrom. The district court denied Johnson's motion to strike, granted in part Nordstrom's motion to strike and granted Nordstrom's motion for summary judgment on all counts. It concluded that Johnson had not demonstrated a *prima facie* case on her failure to promote claim. The court also found that Johnson did not show that Nordstrom's reasons for failing to promote her were retaliatory; she could not prove that Nordstrom's stated reasons were pretextual. As to Archer's and Irwin's retaliatory conduct, the court concluded that Johnson failed to make a *prima facie* case. It also concluded that the conduct was not extreme or

outrageous, such that would support Johnson's claim for intentional infliction of emotional distress. Johnson appeals.

II.

As everyone should know, we review a grant of summary judgment *de novo,* viewing all the facts and inferences in the light most favorable to the non-moving party. *See Pafford v. Herman,* 148 F.3d 658, 665 (7th Cir. 1998). "Summary judgment may be granted only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Pafford,* 148 F.3d at 665.

To defeat a motion for summary judgment in a Title VII case, a plaintiff who cannot provide direct evidence of discrimination may use the "burden-shifting" method outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this indirect method of proof, the plaintiff first may raise an inference of discrimination by offering sufficient evidence to establish a *prima facie* case. *See id.* at 802-05. If the plaintiff succeeds, the burden then shifts to the employer, who must articulate a "legitimate, nondiscriminatory reason" for the adverse action. *See Pafford,* 148 F.3d at 665 (citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). "If the employer carries this burden, then the burden shifts back to the plaintiff to produce 'evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory.'" *Pafford,* 148 F.3d at 665 (quoting *Sattar v.*

Motorola, Inc., 138 F.3d 1164, 1169 (7th Cir. 1998) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993))).

To establish a *prima facie* case of race discrimination in a failure to promote context, the plaintiff must show: 1) she is a member of a protected group; 2) she was qualified for the position sought; 3) she was rejected for the position; and 4) the employee promoted was not a member of the protected group and was not better qualified than the plaintiff. *See Payne v. Milwaukee Cty.*, 146 F.3d 430, 434 (7th Cir. 1998). It is undisputed that Johnson satisfies the first criterion. But the district court found that she failed to meet other elements of the *prima facie* case.

A.

The district court first concluded that Johnson had failed to make out her *prima facie* case of discrimination because she had not met her burden of showing that she was qualified for the beauty director position. The court found that the job consisted of training staff; directing the Nordstrom make-up team; overseeing promotional events and addressing staff questions and concerns. Entry on Plaintiff's Motion to Strike, Defendants' Motion to Strike, and Defendants' Motion for Summary Judgment at 36 (Sept. 26, 2000). The court concluded that Johnson was not qualified for this position because of 1) Johnson's interview answer (misstating the most important element of the position); 2) Johnson's tension with her co-workers; and 3) Johnson's failure to observe certain work policies. These factors do not appear to establish that Johnson was not qualified for the job. But we need not decide that issue; rather, we conclude that these are the

reasons proffered by Nordstrom for failing to promote Johnson, and that Johnson has failed to demonstrate that these reasons are pretextual. *See EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 150 (7th Cir. 1996) ("To expedite the process it may be preferable to get past the *prima facie* case and examine the pertinent issue of whether there was discrimination in a job action."); *see also Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1391 (7th Cir. 1990) (where the plaintiff had not met the burden of showing pretext, it was not necessary to decide whether the plaintiff established a prima facie case).

To demonstrate pretext, "a plaintiff must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation." *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) (citing *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)). Without direct evidence of pretext, the plaintiff must "prove pretext indirectly by showing one of the following: (1) Defendant's explanation of Plaintiff's discharge had no basis in fact, or (2) the explanation was not the 'real' reason, or (3) at least the reason stated was insufficient to warrant the [allegedly discriminatory action]." *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994) (citing *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989)).

Thus, Johnson's burden was to show that Nordstrom lied when it stated that it believed Johnson was unqualified for the beauty director position, or when it stated that it believed Bennett was more qualified. Johnson's subjective belief that she was better qualified than Bennett does not, without more, demonstrate pretext. *See Johnson v. University of Wisconsin-*

than it is about the construction of specific contract language. The majority below construed that contract language as a clear expression of the parties' intent to provide the public with all of the rights on the replacement sidewalk that it had enjoyed on the previous sidewalk, including the right to free speech associated with a public forum. Pet.App. 19a. The dissent by Judge Brunetti disagreed with the majority's construction of the relevant contract language, but not with its view that the outcome of this case turns on the fact-specific meaning of particular contract provisions read in their unique context.

> I agree with the majority that, if the Venetian had truly given the public an explicit right to its property in the 1999 Agreement, then this sidewalk would indeed fall within the ambit of the First Amendment. This is in essence a matter of contract interpretation, and I believe that close scrutiny of the circumstances that led to the contract and the plain language of the contract itself, as well as the history of the piece of property at issue and its physical characteristics, will compel an entirely different conclusion than that arrived at by the majority.

Pet.App. 27a-28a.

In construing the contract language, the majority below expressly rejected petitioner's claim that it had reserved the right to exclude anyone it chose from access to the replacement sidewalk. After carefully reviewing the contested provisions, the court below concluded that petitioner had in fact contractually agreed to guarantee the public unobstructed access to the replacement sidewalk as part of a comprehensive development plan that included widening Las Vegas Boulevard to accommodate a projected increase in traffic. As the court of appeals further noted, this *quid pro quo* was properly memorialized by the parties:

> Thus, there is a recorded servitude on this parcel of private property upon which the replacement sidewalk is located that the Venetian and its successors and assigns dedicate to public use to provide unobstructed pedestrian access on that sidewalk. The recorded agreement also provides in Paragraph 7 that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.

Pet.App. 8a-9a.

Petitioner's belated objection to its own negotiated agreement is both unpersuasive and inconsistent. At the district court hearing concerning the Venetian's unsuccessful motion for a preliminary injunction, the hotel's attorney acknowledged the public's right to use the sidewalk as part of the uninterrupted pedestrian path along Las Vegas Boulevard. Pet.App. 7a-8a. Moreover, he acknowledged that this right included "all incidental activity." *Id.* at 9a. In response to that concession, the Ninth Circuit made the unexceptional observation that "free speech is certainly incidental to pedestrian traffic." Pet.App. 9a, citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Both on appeal to the Ninth Circuit and before this Court, petitioner has attempted to disavow its earlier concession by arguing that the reference in the contract to "unobstructed public access" was only meant to ensure compliance with the Americans with Disabilities Act. But, as the Ninth Circuit bluntly stated, "this corresponds neither with the statements to the district court nor with other references in the agreement." Pet.App. 8a. In any event, whatever disagreement may exist about the particular scope of this par-

ticular contract is necessarily fact-specific and does not warrant plenary review by this Court.

II. THE CASE DOES NOT CLEARLY AND DIRECTLY PRESENT THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS RAISED BY PETITIONER IN ITS COMPLAINT

Petitioner's statement of the question presented focuses exclusively on the issue of state action. The Venetian accuses the Ninth Circuit of putting the cart before the horse by holding it to constitutional requirements without explicitly finding state action. Yet, petitioner has it backwards. The problem with petitioner's formulation is that it is unnecessary to reach the state action question in order to dispose of its Fifth Amendment takings and Fourteenth Amendment due process claims. No property interest has been taken or impaired in this case because petitioner consented to unobstructed pedestrian passage in order to obtain approval for its plans to construct the casino. By focusing on state action instead of the theory of its own case it is petitioner, rather than the Ninth Circuit, that has placed the cart before the horse.

In *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994), this Court stated that "[d]edication for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from proposed property use" and not a constitutional taking. More importantly, when the Venetian agreed to replace the existing sidewalk with a new sidewalk to resolve the issue of pedestrian passage along Las Vegas Boulevard, it explicitly consented to this use of the property, thus giving up the right to exclude the public. This is the touchstone of the inquiry under the Fifth Amendment Takings Clause. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Nollan v. California Coastal*

Comm., 483 U.S. 825, 831 (1987). The Venetian simply does not have the property right it now seeks to enforce. Without that right, there can be no Fifth Amendment or Fourteenth Amendment loss of property.

III. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS AS ASSERTED BY THE PETITIONER AND PRESENTS NO SIGNIFICANT LEGAL ISSUE

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Petitioner cannot have it both ways. Once having obtained approval to demolish the old sidewalk and build the casino it cannot walk away from its promise to provide unobstructed pedestrian passage. The agreements did not give the Venetian a new right to prevent people from walking down the street. Nor can this case mask the unmistakable public function that petitioner has undertaken. Holding petitioner to constitutional requirements under the circumstances present in this case is hardly controversial.

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IV. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER COURTS

Finally, petitioner has not identified any meaningful conflict that requires this Court's intervention or resolution. In support of its asserted conflict, petitioner primarily relies on a series of state and federal decisions involving shopping malls. Pet. at 14-15. As the Ninth Circuit noted, however, those decisions are easily distinguishable from the present controversy.

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In light of the Nevada Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a "concrete conflict" between the State Court and the Ninth Circuit "that can only be resolved by this Court," Pet. at 20, is incorrect.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

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